

Party Closures as a Measure of Militant Democracy in Turkey

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Abstract

The thesis explores the concept and practice of militant democracy in Turkey, with the focus on party closures. After its establishment in 1961, the Turkish Constitutional Court closed much higher number of political parties than other European countries that institutionalized militant democracy. Most of the parties that are closed by the Court are Kurdish nationalist, Islamist and socialist/communist parties. This thesis aims to find out the reason of this situation.

First of all this study reveals that one of the reasons of the activism of the Court is the wide range of prohibitions offered by 1982 Constitution and the Law on Political Parties. By making analysis of the three party cases that represent three party categories frequently closed by the Turkish Constitutional Court, this study shows another reason of the frequent party closure practice in Turkey: the Court uses its power of interpretation to prioritize the state ideology as compared to freedom of assembly and association.

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I dedicate my thesis to 301 mine workers who died in Soma, Manisa because of inhumane working conditions.

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List of Abbreviations

DP: Democratic Party

JP: Justice Party

NSC: National Security Council

NUC: National Unity Committee

OZDEP : Freedom and Democracy Party (*Ozgurluk ve Demokrasi Partisi*)

RP : Welfare Party (*Refah Partisi*)

RPP: Republican People's Party

TBKP :United Communist Party of Turkey (*Turkiye Birlesik Komunist Partisi*)

TSR: The Senate of the Republic

CHAPTER 1: Introduction

After its establishment in 1961, the Constitutional Court of Turkey has closed 26 parties with a total of 44 prohibition requests initiated by the Chief Prosecutor.¹ Thus, my starting point is the fact that the Constitutional Court banned much higher number of political parties than other European countries that institutionalized militant democracy. Hence, in this thesis I explore the following question: **“Why did Turkish Constitutional Court close high number of parties compared with the practices in Europe?”**

In this respect, justification of party closures in a democratic regime gains importance. Theory of militant democracy explains under what conditions states can justifiably depart from majoritarian democracy. This theory was set forth by Karl Lowenstein in 1937 after the collapse of Weimar Republic and in the condition marked by the rise of fascism in Europe. Lowenstein argues that democracy faced with the attacks of fascism and other totalitarian ideologies should focus on protecting itself by fighting those threats, even if it means violating some of the basic principles of democracy. Perhaps most prominent among such threats are the antidemocratic parties that abuse political pluralism and constitutional freedoms (especially freedom of speech and freedom of assembly) to realize their antidemocratic aims and ultimately destroy democratic regime.² Thus, it is justifiable and even a necessity to implement repressive techniques towards them such as restricting the freedom of assembly and freedom of speech and closing them.³ To be able to answer my research question I would like to explore how the concept of militant democracy implemented in Turkey by focusing on its political and legal history.

¹Isik, Huseyin Murat. *Anaya Mahkemesi Kararlarinda Devletin Resmi Ideolojisi*, (Ankara: Adalet Yayınevi, 2012), 490

²Cliteur, Paul. and Rijpkema, Bastiaan, *The Foundations of Militant Democracy in The State of Exception and Militant Democracy in the Time of Terror*, ed. A. Ellian (Republic of Letters Publishing: 2012) :235

³Muller, Jan-Werner. *Militant Democracy in The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajó (Oxford : 2010) :1258

If we consider the regulations in the Constitution and Law on Political Parties related with party closures, it can be said that there are mainly two principles that they aim to protect namely: the principle of indivisible integrity of the state and principle of secularism. The violation of these principles constitutes the basis of party closure decisions of the Constitutional Court. In practice, we can see that the Islamist parties were closed because of violation of the principle of secularism. Kurdish nationalist parties were closed as they violated the principle of the indivisible integrity of the state. Socialist/communist parties were closed not only they infringed the principle of the indivisible integrity of the state with its territory and nation, but also because of the socialist communist ideology they embrace.

1982 Constitution and Law on Political Parties provide wide range of permissible restrictions on political parties. These regulations, as well as the decisions of Turkish Constitutional Court are subject to the criticism of European Commission for Democracy Through Law (Venice Commission) and scholars. If we take into account that the Constitutional Court gives its party closure decisions based on these regulations, one of the reasons of the frequent closure of political parties can be the lower threshold created by these regulations. However, there is one more explanatory factor that has to be taken into account. It might be the case that the Constitutional Court interprets this long list of prohibitions with rigidity.⁴ Hence, in this thesis I would like to further explore: **“What is the role of the Constitutional Court’s interpretation in the practice of militant democracy in Turkey and especially in frequent closure of the political parties?”**

In responding to this question, I will focus on the primary source, the judgments of Constitutional Court in Turkish, which can be found online in the official web-site of the Turkish Constitutional Court. This will be supplemented by the use of the relevant

⁴ Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, *Democratization* 17, no. 1(2010): 126

academic literature. And I will analyze the reasoning of the Court to explore how it interprets the legal regulations. This would hopefully lead me to an informed insight on the question of whether it is possible to interpret the regulations stated in the 1982 Constitution and Law on Political parties in a more liberal way.

I will also use the judgments of European Court of Human Rights about the party closure decisions of the Turkish Constitutional Court. The ECHR has heard nine cases against Turkey concerning political party bans by the Turkish Constitutional Court and has ruled against the decisions of the Turkish Constitutional Court except the Islamist Welfare Party case. It ruled that Turkey violated 10th and 11th articles of the European Convention which aim to protect freedom of expression and freedom of assembly and association. In its judgments, the ECHR most of the time criticizes the reasoning of the Turkish Constitutional Court and discusses if legal provisions that provides the basis of the closure decision could be interpreted in a more liberal way. That is why I believe that a reference to the decisions of the ECHR will be useful in addressing my research questions.

I will analyze decisions of the Constitutional Court regarding three political parties, namely: Freedom and Democracy Party (*Ozgurluk ve Demokrasi Partisi*, OZDEP), United Communist Party of Turkey (*Turkiye Birlesik Komunist Partisi*, TBKP) and Welfare Party (Refah Partisi, RP). These parties were banned for different reasons. OZDEP is a Kurdish nationalist party and in this case I will focus on the violation of the principle of the indivisible integrity of the state. In Refah Party case, I will be able to discuss violation of the principle of secularism as a reason of party closure. I will also include the decision regarding the TBKP as it is related with defending the constitutional order against the class-based rule.

The thesis will proceed in the following manner. In the first part chapter, “The Concept of Militant Democracy” I will analyze militant democracy by focusing on its

definitions, discover its justification and functions and I will also stress the problems stemming from this concept. In this chapter I will also discuss the closure of political parties as a measure of militant democracy. In the second chapter, “Militant Democracy in the Evaluation of the Turkish Constitutionalism”, I will explain how the concept of militant democracy was implemented in Turkey by tracing the genealogy of political and legal history of modern Turkey. In the third chapter, “The Part Closure Decisions of the Turkish Constitutional Court Read in The Light of the ECHR Judgments”, I will start with summarizing and analyzing the legal limitations related with party closures in the 1982 Constitution and Law on Political parties. My secondary aim in this section is to provide legal background for analysis. In this chapter, I will analyze the decisions of the Constitutional Court about three parties I mentioned above.

CHAPTER 2: The Concept of Militant Democracy

2.1. *Militant Democracy in Theory*

It is not possible to find a universal definition of militant democracy which is mutually agreed by all scholars. Otto Pfesmann offers one of the most comprehensive definitions of militant democracy as “a political and legal structure aimed at preserving democracy against those who want to overturn it from within and those who openly want to destroy it from outside by utilizing democratic institutions as well as support within the population.”

Gregory H. Fox and Georg Nolte define militant democracy narrowly as “setting of measures to prevent the change of a state’s own democratic character by the election of anti-democratic parties”.⁵ According to Jan-Werner Muller militant democracy refers to “the idea of a democratic regime which is willing to adopt pre-emptive, prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime.”⁶

Based on these definitions, Svetlana Tyulkina indicates four distinct features of militant democracy to stress how it differs from a tolerant constitutional democracy. Firstly, militant democracy has a preventive character and the states are not required to wait until those who want to destroy or overturn the system realize their aims. Secondly, because of prescribed mechanism to take pre-emptive actions, militant democracy departs from majoritarian democracy. Thirdly, these enemies are using their rights given to them by democracy and open society to harm democratic structures. Lastly, the aim of militant

⁵Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 34

⁶Muller, Jan-Werner. *Rethinking Militant Democracy: An Introduction: A “Practical Dilemma Which Philosophy Alone Cannot Resolve”?* *Rethinking Militant Democracy: An Introduction*, *Constellations* 19, no.4(2012): 537

democracy is to secure the democratic nature of the state and it differs radically from national security, public order and public safety.⁷

If we consider the course of actions offered by militant democracy, it can be argued that it contradicts the nature of a liberal democracy and because of its preventive nature it is a rather problematic concept. That is why, its standard justification in constitutional theory gains importance. It makes sense to begin with the arguments of Karl Lowenstein as he was the one to offer the term “militant democracy” and to construct a systemized account of militant democracy measures and their justification.⁸

Karl Lowenstein introduced the term militant democracy in the series of two articles published in 1937.⁹ These articles, titled “Militant Democracy and Fundamental Rights” were an attempt to explain the causes of the collapse of the Weimar Republic which could be interpreted as the defeat of democracy.¹⁰ In these articles Lowenstein expressed his fear that democracy will be defeated by autocracy in their existential battle in which democracy seems to be the weaker side.¹¹ According to Lowenstein, the main characteristics of autocracies are the lack of separation of powers and absence of mutual control within the administration. A person or group of persons has an absolute power over the executive, legislative and often also the judicial branch. Therefore, Lowenstein uses autocracy as a broad category which refers to an absolutist system. Under autocracy he gives the examples of German and Italian fascism and also Soviet communism. He stresses that autocratic regimes are not new; on the contrary they are by far the most dominant form of government.¹² For him, in Europe this autocratic threat stems from fascism. He argues that fascism is not an ideology, but rather a

⁷Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 35

⁸*Ibid*, 37

⁹*Ibid*, 1

¹⁰*Ibid*, 14

¹¹Cliteur, Paul. and Rijpkema, Bastiaan, *The Foundations of Militant Democracy in The State of Exception and Militant Democracy in the Time of Terror*, ed. A. Ellian (Republic of Letters Publishing: 2012) :230

¹²*Ibid*, 231

political technique for grasping power with the simple intention to rule.¹³ Fascism has no proper intellectual content; rather it relies on a kind of emotionalism which democracies could never compete with.¹⁴ The secret success of the fascist movement stems from its mastering of the techniques of combining emotionalism with extraordinary conditions provided by democratic institutions.¹⁵ This argument is based on the assumption of crowd psychology which sees the people as masses who are not capable of thinking, all they could do was feel or be controlled by instinct. That is why, they can be easily dominated by demagogues and charismatic leaders that manipulate their emotions and instincts.¹⁶

Andras Sajo furthers Lowenstein's argument and claims that "emotionalism of totalitarian religious fundamentalism is not very far from that of emotionalism of extreme right and left totalitarian movements."¹⁷ The totalitarian movement uses emotional politics in order to establish an irreversibly anti-democratic system of power. The Islamist fundamentalism might aim at this irreversible shift in Muslim countries. Therefore militant democracy is applicable to these state democracies.¹⁸ So, it is important to find out what makes democracy vulnerable and open to the attacks of fascism and other totalitarian ideologies. Cliteur and Rijpkema point out three reasons of vulnerability of democracy based on the analysis of Lowenstein's arguments. First, democracy is governed by compromise due to its inherent structure. Although under normal conditions this is an agreeable characteristic of self-government, this search for compromise leads to indecision and inaction in the times of economic crisis. The possible exploitation of this flaw makes democracy vulnerable.

¹³Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 14

¹⁴Muller, Jan-Werner. *Militant Democracy in The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (Oxford : 2010) :1257

¹⁵Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 14

¹⁶Muller, Jan-Werner. *Militant Democracy in The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (Oxford : 2010) : 1257

¹⁷Sajo, Andras. *From Militant Democracy to the Preventive State* *Cardozo Law Review* 27, no. 5(2006): 2263

¹⁸*Ibid*, 2264

Second, democracy offers constitutional freedoms even to its most hostile opponents who may use them to discredit or vilify it. Freedom of speech can be used for the dissemination of antidemocratic propaganda and the freedom of assembly enables antidemocratic parties to organize themselves around their antidemocratic aims. Third, democracy cannot prevent these hostile parties from accessing the institutions that they have preached to destroy after the elections.

The universal technique of fascism perfectly uses these three weaknesses. The application of fascist techniques makes the establishment of an autocratic regime inevitable. That is why according to Lowenstein, to prevent autocratic threat, democracy needs to abandon its passive attitude and take precautions against parties that threaten its survival. In other words, democracy should no longer be pacifist, it should become militant.¹⁹

Consequently, democracies and elites who still believe in democracy, have to find repressive techniques to anti-democratic forces, such as banning parties.²⁰ They should restrict the freedom of assembly and speech, control access to public office and even threaten the loss of citizenship. As it is stated by Lowenstein “fire should be fought with fire”, and this can be realized by disciplined or an authoritarian democracy.²¹

Ideas similar to Lowenstein’s were offered in the works of other scholars during the same period of time. In *The Open Society and Its Enemies* Karl Popper brings two paradoxes: the paradox of tolerance and the paradox of democracy. Parallel with Lowenstein’s argument, the paradox of tolerance is explained by Popper as “unlimited tolerance that must lead to the disappearance of tolerance”. For him, unlimited tolerance should not be shown to those who are intolerant, otherwise “the tolerant will be destroyed and tolerance with them”.²² According

¹⁹Cliteur, Paul. and Rijpkema, Bastiaan, *The Foundations of Militant Democracy in The State of Exception and Militant Democracy in the Time of Terror*, ed. A. Ellian (Republic of Letters Publishing: 2012): 235

²⁰Muller, Jan-Werner. *Militant Democracy in The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (Oxford : 2010) : 1257

²¹Ibid, 1258

²²Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 2

to Popper, paradox of democracy stems from the self-contradictions of the majority rule. The problem is the possibility that the majority would decide to be ruled by a tyrant one day.²³

Another justification of militant democracy is offered by Andras Sajó in constitutional theory. He claims that self-defense is the state's most natural characteristic and militant democracy can be justified on this ground. Similarly to Popper he argues that democracy based on majority rule might give an opportunity to the majority to establish a regime that may dissolve democracy. That is why the aim of democratic self-preservation is inherent to the nature of democracy.²⁴

There are some critiques about the justification of the militant democracy concept that has to be considered while analyzing the practice of militant democracy in various jurisdictions. First of all, to a certain degree militant democracy is a self-contradictory concept as it limits rights and liberties in order to secure their existence. That is why the idea has been criticized since its establishment. It is debatable if democracy can behave in a militant way and remain true to itself. As it can be observed from the definitions of militant democracy, the argument that can outweigh this critique is that democracy cannot afford to be passive when its basic structures are being attacked and could be possibly dissolved. It can be further argued that democracy is in self-contradiction if it allows its enemies to act in this way.

Secondly, there may be a difference between justification of militant democracy in theory and its effectiveness in practice.²⁵ Otto Pfersmann defines this problem as one of the major dilemmas of militant democracy. It has to be taken into account that the practice of militant democracy faces various difficulties that can limit its effectiveness. If we consider the example of Turkey, it is fair to argue that the state is in a difficult situation while closing the ruling Refah Party which is supported by high number of voters.

²³ Ibid, 13

²⁴ Ibid, 41

²⁵ Ibid, 56

Thirdly, it is difficult to define the right moment to implement the measures of militant democracy. The main question about this matter is that, how to define the point when democracy is endangered, who gives the decision and who is authorized to initiate the procedure. A preliminary conclusion about this matter is that it is the judiciary who should decide the degree of threat by taking into account local conditions.²⁶

Fourthly, because of its extremely political nature, the militant democracy concept can be abused for political purposes. This possibility can be a serious argument against the justification of militant democracy. In order to prevent leading political groups to use the measures of militant democracy to suppress their political opponents, the judiciary should actively take part in the procedure.²⁷

2.2. Party Closures as a Measure of Militant Democracy

Peacefully existing and electorally contesting political parties are essential elements of contemporary democratic systems. However, some of the political parties do not embrace the idea of democracy or the legitimacy of the existing system or constitution. They can be highly anti-democratic or strongly anti-establishment. Then the problem is how the democratic systems should deal with these anti-systemic or anti-constitutionalist parties.²⁸ Different countries have found different solutions to this problem. While some countries such as Turkey, Croatia, Italy, Germany, Poland, Spain and France close antidemocratic parties by establishing constitutional or legislative mechanisms, some of them do not explicitly close them if we consider United States or United Kingdom.²⁹

As it is argued by Giovanni Capadocia, among repressive measures that can be implemented to control antidemocratic internal threats to democracy, party closure can be

²⁶Ibid, 57

²⁷Ibid, 58

²⁸Celep, Odul. The Political Causes of Party Closures in Turkey, Parliamentary Affairs (2012) : 3

²⁹Mersel, Yigal. The Dissolution of Political Parties: The problem of internal democracy, International Journal of Constitutional Law 4, no.1 (2006):92

seen as the most radical defensive measure of a democratic regime and by no means democratic in itself. “Party closures go right to the heart of both political pluralism and the process of democratic representation, in which citizens choose freely their government from several competing parties.”³⁰

Party closures create a dilemma for democratic systems because the ideas of democracy and party closure do not reconcile with each other in principle. Closure of political parties restricts freedom of association and expression, which is problematic from a democratic perspective even if it is done in the name of protecting the enjoyment of democracy and political liberty in society.³¹

Considering the elements of militant democracy discussed above, party closure is a preventive measure to the extremist parties in order to avoid the “harm” that party can do to the regime. This is what justifies the restriction of basic rights as well as the state’s intrusion to the free dynamic of party pluralism. This means that there is a need for identifying the extremists within a society. It can be said that different countries and changing political conjunctures produce different extremists. What is seen as a threat today to a specific country may not to be a threat tomorrow, which is the difficulty that the literature on political party banning faces.³²

Samuel Issacharof states three distinct reasons of party prohibitions each of which raises a separate set of concerns. “First, there are the prohibitions on parties that operate as legal propagandistic fronts for terrorist or insurrectionary groups that are independently subject to criminal prosecution or defensive military operations. Second, there are prohibitions on parties that align themselves with regional independence forces, generally

³⁰Capadocia, Giovanni, 2007, Democratic Militancy and Democratic Rule: Party Ban in Western Europe, work in progress

http://www.ptesc.ssc.upenn.edu/Paper_pdf/Capoccia%20part%201.html?action=show&person=125

³¹Celep, Odul. The Political Causes of Party Closures in Turkey, Parliamentary Affairs (2012) : 4

³²Cappocia, Giovanni, “Democratic Militancy and Democratic Rule: Party ban in Western Europe”, work in progress, 2007

http://www.ptesc.ssc.upenn.edu/Paper_pdf/Capoccia%20part%201.html?action=show&person=125

premised on religious or ethnic distinctions that take a political stance opposing the continued territorial integrity of the country. Lastly, there are prohibitions on parties that seek a platform for a sustained challenge to the core values of liberal democracy but whose objective is to greater and lesser extents to claim power through a majority mandate in the electoral arena.”³³

Insurrectionary parties may seek to participate elections for the purpose of advertising their views without any real intention to seriously compete for political office. Many minor parties in the world, including all third parties in the United States can be placed within this category. These parties can threaten the political order despite their lack of political capital, if they use the electoral arena for defending their illegal activities.³⁴

Separatist parties align themselves with a movement which aims to change the preexisting form of the state. They do not have any realistic aim of gaining the support of a majority of citizens and rather they seek to challenge the political will of the majority to continue their hold over a distinct region of the country. They often ask for democratic self-determination. Most of the time the separatist movement has a paramilitary component that threatens the security of the democratic state or its citizens. In these conditions, a democratic state has compelling reasons to protect itself against armed insurrection and may seek to close the nonmilitary political party promoting separatist aims. There are two distinct reasons of the closure of separatist parties. “First they may serve to provide legal cover for attacks on the state through force or violence. Second, states can declare that their territorial boundaries are beyond the scope of proper political debate as it can be seen in Turkey.”³⁵

Antidemocratic majoritarian parties represent a more serious challenge for democracy compared with other party categories because of their capability of seizing power from within the national electorate. Among the antidemocratic majoritarian parties Islamic

³³Issacharof, Samuel. *Fragile Democracies*, Harvard Law Review 120, no.6 (2007): 1432

³⁴Ibid , 1433

³⁵Ibid, 1438

parties may seek majority status for the purposes of imposing clerical law by abolishing democracy. Turkey experiences the most dramatic and difficult challenge about this issue.³⁶

In most countries with rules on party closure, political parties are closed by the Constitutional Court, based on the legal arrangements which identify extremists. While laws of different countries may in principle establish a very large number of reasons for which a party can be banned, Giovanni Capoccia distinguishes between two general ‘legal paradigms’: “neutral” and “targeted”. A “neutral” paradigm determines some constitutional objects and values in other words a ‘constitutional core’ on which dissent is not allowed. This can be expressed by different wordings such as ‘the sovereignty and the constitutional order’ of the state. Targeted paradigm identifies the extremists in ‘positive’ terms by their ideology such as Fascism and/or Nazism.

While deciding whether or not ban a party based on neutral laws, the courts would have to first establish a definition of the protected ‘object’ that the party is violating with its actions or behavior; then it would have to show that the party is actually violating it through an analysis of the party’s ideology or actions. Different from the neutral laws, targeted laws enables particularly strong and straightforward (in relative terms) legal reasoning.

That is why, constitutional court’s interpretation of the neutral law and definition of the ideology and actions of the party becomes critical. It can be said that the Constitutional Court’s interpretations of the legal text may differ depending on size and characteristics of the extremist party in question and whether the party represents an immediate risk for the persistence of democracy in a country, or some other equivalent harm.

Moreover, violation of certain legal criteria by extremist political parties does not mean that the courts will necessarily avail themselves of the option of closing them. As the

³⁶Ibid, 1442

party bans are costly decisions, before the decision to close the political parties is taken, there are going to be numerous points to take into account, such as the costs and benefits, historical and current political situation, internal dynamics, as well as relations between various elements within the society.³⁷ It is important to stress that while deciding to the closure of the party, the decision's cost and benefits to democracy is another factor to take into account as it is the aim of protecting democracy that legitimates the power of the Constitutional Court.

³⁷Cappocia, Giovanni, "Democratic Militancy and Democratic Rule: Party ban in Western Europe", work in progress, 2007
http://www.ptesc.ssc.upenn.edu/Paper_pdf/Capoccia%20part%201.html?action=show&person=125

CHAPTER 3: Militant Democracy in the Evolution of the Turkish Constitutionalism

Militant democracy has co-determined the Turkish political paradigm, whose development has been guided by certain radical political changes such as the Turkish revolution and modernization, authoritarian political culture and also the two military coups that broke constitutional continuity.³⁸

I will try to follow the traces of the concept of militant democracy by analyzing the constitutions that are written after these radical changes. Since its foundation on 29 October 1923, the Turkish Republic has been governed by three different constitutions respectively as, the Constitutions of 1924, 1961 and 1982. The 1924 Constitution follows the Turkish Revolution in 1923, and the 1961 and 1982 Constitutions are the products of the two military coups in 1960 and 1980.

3.1. Single Party Period (1923-1946)

3.1.1. Revolution, Its Ideology and the Most Important Measures

From the founding of the Republic in 1923 to 1950, the Republican People's Party (*Cumhuriyet Halk Partisi*, RPP) governed Turkey in a single-party framework. The RPP was founded by Mustafa Kemal Atatürk, the first President of Turkey, and the rest of the nation's founding elite.³⁹ During single party rule of the RPP between 1923 and 1950, there was no meaningful distinction between the party and the state.⁴⁰ In 1936, Prime Minister İsmet İnönü announced the congruency between the state structure and the party organization as the official policy. "This meant that, for example, the governor of a province would automatically

³⁸Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel (Ashgate:2009), 263

³⁹Varol, Ozan. The Democratic Coup d'Etat, Harvard International Law Journal 53, no. 2 (2012):323

⁴⁰Belge, Ceren. Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, Law & Society Review 40, no. 3 (2006): 659

be the head of the RPP branch in his province.”⁴¹ As a result, Turkey’s founding elite that established the RPP, and members of the party filled both bureaucratic and governmental positions.⁴² Moreover, during single-party rule, the state’s ideology was the party’s ideology that was based on “Kemalism” and followed Mustafa Kemal Atatürk’s views on political, economic, social modernization, national unity, and most importantly secularism.⁴³

Secularism was applied to the new Turkish political context in a short period of time with a series of top-to-bottom reforms.⁴⁴ Kemalism embraced assertive version of secularism the main intention of which was exclusion of Islam from public sphere and confine it to the private domain.⁴⁵ The signs of this policy can be seen in the abolishment of caliphate (the symbol of Islamic leadership) by General Assembly in 1924 as well as the change of calendar from the Islamic lunar calendar to the Western solar one in 1926. More importantly, Islamic law was abolished and replaced by the Swiss Civil Code, Italian Penal Code, and German and Italian Commercial codes in 1926 to neutralize the effect of the religion in the legal system. In 1928, the Arabic script was replaced by the Latin script. During this process many influential leaders lost their jobs and positions in the society and scholars became illiterate in a short period of time.⁴⁶ It was assumed that the population would gradually accept these top-to-bottom reforms.⁴⁷ However, Kemalist reforms did not penetrate deeply into Turkish society as planned⁴⁸ which became clear after the transition to the multi-party system, with different groups expressing their disagreement with the secularist policies.⁴⁹

⁴¹Zürher, Erich Jan. *Turkey a Modern History*, (London: Tauris, 2004), 177

⁴²Belge, Ceren. Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, *Law & Society Review* 40, no. 3 (2006): 659

⁴³Varol, Ozan. The Democratic Coup d’Etat, *Harvard International Law Journal* 53, no. 2 (2012):323

⁴⁴Celep, Odul, *The Political Causes of Party Closures in Turkey*, *Parliamentary Affairs* (2012) :11

⁴⁵Kuru, Ahmet. Review of Islam and Secularism in Turkey: Kemalism Religion and Nation State, *Middle East Journal* 65, no. 1 (2010): 161

⁴⁶Ozyurek, Esra, *The Politics of Memory in Turkey*, (Syracuse, NY: Syracuse University Press, 2007), 122

⁴⁷Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 214

⁴⁸Jung, Dietrich. “Secularism”: A Key to Turkish Politics, *Intellectual Discourse* 14, no. 2(2006): 136

⁴⁹Tyulkina, Svetlana. *Militant Democracy*, (PhD diss., Central European University, 2011) : 214

“Moreover, the early Republican elite aimed to create a new ‘Turkish’ nation (millet) in the modern sense, differently from the understanding of the old Muslim/Islamic community of the Ottoman times. For this purpose, one of the fundamental principles of modern Turkey has been ‘Turkish nationalism’ in accordance with Atatürk nationalism. This understanding of nationalism aimed to create a contemporary, democratic notion of citizenry in Turkey, similar to the European understanding of citizenship.”⁵⁰ However, the early Republican understanding of Turkish nationalism was exclusionist due to the fact that identities other than Turkish-Sunni-Muslim identity such as Kurdish and non-Muslim identities were largely suppressed or ignored during this period.⁵¹

These social engineering projects of secularization and Turkification created deep cleavages after transition to the multi-party period concerning the balance between the state elite - the unelected state bureaucracy consisting of the military officers, judges, high-level bureaucrats - and the political elite including elected politicians, political parties, and the parliament.⁵² The state elites regard themselves as the heirs of the Kemalist legacy and the legitimate guardians of the national interest against the particularistic interests represented by the political elite.⁵³

As a result, the state elites see Kurdish nationalism as a threat to Turkish nationalism and perceive Islamic revivalism as an existential threat to the secular order. In order to minimize these threats posed by these two currents represented by political parties, the state elites have developed a defense mechanism in the form of “militant democracy”.⁵⁴ Among the state elites, the military had a dominant role during the drafting of every constitutional

⁵⁰Celep, Odul, *The Political Causes of Party Closures in Turkey*, Parliamentary Affairs (2012) :11

⁵¹Ibid, 12

⁵²Bali, Ash. *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, Virginia Journal of International Law 52, no.2 (2012):244

⁵³Shambayati, Hootan. *The Turkish Constitutional Court and the Justice and Development Party*, Middle Eastern Studies 48, no.1 (2012):109

⁵⁴Celep, Odul, *The Political Causes of Party Closures in Turkey*, Parliamentary Affairs (2012) :11, 12

document which it justified with reference to its self-ascribed guardianship role over the Kemalist principles. This understanding of its own role made the Turkish military a supraconstitutional actor.⁵⁵

3.1.2. The Constitution of 1924

The Constitution of 1924, which stayed in force until 1961, was the first constitution to be approved by the Turkish Grand National Assembly elected in 1923. The 1923 elections were strongly controlled by the RPP and none of the deputies from the first legislative session of the Assembly (1920-1923) had been elected. For this reason, the Turkish Grand National Assembly that approved the Constitution of 1924 was dominated almost entirely by the RPP. The 1924 Constitution was drafted by a commission that consisted of members of parliament appointed by the Turkish Grand National Assembly.

As the new legislature was almost completely dominated by Kemalists, the constitutional debates took place in an atmosphere of relative freedom.⁵⁶ It is argued that even though the 1924 Constitution was written under semi-authoritarian conditions, it had more liberal qualities by virtue of civilian authorship than the 1961 and 1982 Constitutions, both promulgated by military elites following the coups against elected civilian governments.⁵⁷

The 1924 Constitution possessed a brief and simple style in terms of rights and freedoms modeled on the French Declaration of the Rights of Man and of the Citizen.⁵⁸ In Article 68 of the Constitution, liberty is regarded as a natural right endowed at birth and it is stated that the only limitations on liberty are those imposed in the interest of the rights and liberties of others. According to Article 70, inviolability of person, freedom of conscience,

⁵⁵ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3 (2013): 713

⁵⁶ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 11

⁵⁷ Bâli, Asli. Courts and Constitutional Transition: Lessons from the Turkish Case, *International Journal of Constitutional Law* 11, no.3 (2013): 669

⁵⁸ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3 (2013): 712

thought, press, travel, labor, private property, assembly and association are regarded as natural rights of Turks.⁵⁹ Having declared the basic rights of the citizens, it did not include any general or specific restrictions.

The Kemalist reading of popular sovereignty argues that the general will of nation and it is absolute, indivisible and infallible.⁶⁰ This can be understood from the Article 3 of the 1924 Constitution which vested sovereignty on the people without any condition.⁶¹ The legislature cannot be legitimately limited, for it would mean restricting the will of the nation.⁶² Thus, according to Article 5, both the legislative and executive powers are vested and centered in the Grand National Assembly.⁶³ Article 7 states that the Assembly was to exercise its executive authority through the President of the Republic elected by it and a Council of Ministers elected by the President.⁶⁴ Furthermore, the Assembly had the exclusive power to supervise and change the Council of Ministers whenever it found it necessary.⁶⁵

In addition, Article 8 states that the judicial power is exercised in the name of the Assembly by independent tribunals constituted in accordance with the law.⁶⁶ Ahmet Özcan rightly argues that the major weakness of the 1924 Constitution in terms of separation of powers was the lack of an independent judiciary with the power of judicial review. If we take into account that the Assembly embodied both the legislative and executive powers in itself,

⁵⁹The 1924 Constitution, art. 68, 70, sec. 5

⁶⁰ Özbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 12

⁶¹ Ozcan, Ahmet. *Comparative Constitutional Checks and Balances and Turkey*, A Project of the German Marshall Fund, (Ari Hareketi Yayinlari 2012), 67

⁶² Özbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 11, 12

⁶³The 1924 Constitution, art. 5, sec. 1

⁶⁴ Özbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 11

⁶⁵ Ozcan, Ahmet. *Comparative Constitutional Checks and Balances and Turkey*, A Project of the German Marshall Fund, (Ari Hareketi Yayinlari, 2012), 67

⁶⁶The 1924 Constitution, art. 8, sec. 1

this essential lack becomes even more serious. As a result of this deficiency, constitutional basic rights were left poorly protected.⁶⁷

As it is argued by Özbudun, during single party period, such concentration of authority enabled the RPP to implement modernization reforms. However, the lack of constitutional checks and balances created major problems after transition to the multi-party period⁶⁸ as a result of important decision of President İsmet İnönü at the end of 1945 to permit the formation of opposition parties.

Before passing to the multi-party period, it is important to analyze why İsmet İnönü decided to dismantle the one-party system which had given himself and his predecessor, Mustafa Kemal Atatürk absolute power.⁶⁹ RPP government under leadership of İsmet İnönü had become deeply unpopular by the majority of the Turkish population at the beginning of the Second World War.⁷⁰ This opposition increased during the Second World War years, due to the negative effects of the Second World War on Turkish economy and economic policies of the RPP government. In this period the RPP put additional taxes and increased its role in the economy with the “National Defence Law”, which gave it full authority to fix prices and impose forced labour. Especially the peasants were negatively affected by the new economy policies due to the fact that they were required to sell fixed amounts of products at fixed prices, before production was completed.

In order to gain support of peasants, the RPP government proposed a land reform law which would redistribute land to landless peasants. However, this law created disagreement

⁶⁷ Ozcan, Ahmet. Comparative Constitutional Checks and Balances and Turkey, A Project of the German Marshall Fund, (Ari Hareketi Yayinlari, 2012), 67

⁶⁸ Özbudun, Ergun and Genckaya, Omer Faruk, Democratization and the Politics of Constitution Making in Turkey, (Budapest: CEU Press, 2009), 12

⁶⁹ Sayarı, Sabri. Review of “The Politics of Turkish Democracy: İsmet İnönü and the Formation of the Multi-Party System, 1938-1950” by John M. Vanderlippe (Albany, State University of New York Press, 2005):1

⁷⁰ Zürher, Erich Jan. Turkey a Modern History, (London: Tauris, 2004), 208

among the local notables and land owners ⁷¹and it played a crucial role in the emergence of political opposition in postwar Turkey.⁷² Erich Jan Zürcher claims that because of the RPP's close identification with the state apparatus under one party system, this dissatisfaction was directed at the party together with the state. President Inonu was well aware of the growing dissatisfaction with the policies of the RPP in society and knew that it is not possible to suppress it indefinitely. Therefore he decided to allow a degree of political liberalization and the formation of a political opposition as a safety valve.

After the land reform law had been passed, four deputies including Adnan Menderes submitted a proposal to the RPP Assembly Group, which is known as “the Memorandum of the Four”, asking for the Turkish constitution to be implemented in full and democracy established.⁷³ Later, on 1946 the Democratic Party (*Demokrat Parti*, DP) was formed by four signatories of the ‘Memorandum of the Four’ which left or been forced to leave the RPP.⁷⁴ Shortly after its foundation, the DP became a center of all the opposition forces dissatisfied with more than twenty years of authoritarian republican rule.⁷⁵

3.2. Multi Party Period

3.2.1. Political Instability 1950-1960

The DP came to power under the leadership of Adnan Menderes after the 1950 elections in which it won the 408 seats of a total of 487 seats by gaining the 52.7% of the votes.⁷⁶ Until 1960, despite the existence of a number of other political parties, there was a two-party system with the DP in power and the RPP in opposition.⁷⁷ It is important to

⁷¹ Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005): 26

⁷² Zürcher, Erich Jan. *Turkey a Modern History*, (London: Tauris, 2004), 208

⁷³ Ibid, 210

⁷⁴ Zürcher, Erich Jan. *Turkey a Modern History*, (London: Tauris: 2004), 211

⁷⁵ Jung, Dietrich. “Secularism”: A Key to Turkish Politics, *Intellectual Discourse* 14, no. 2(2006): 136

⁷⁶ Zürcher, Erich Jan. *Turkey a Modern History*, (London: Tauris, 2004), 217

⁷⁷ Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005):25

mention that the RPP and the DP were representing different cultural and political fault lines. While the RPP was representing the secular elite, the DP was supported by a largely rural constituency.⁷⁸

The problems of the 1924 Constitution became obvious during the ten year-rule of the DP. “The unrestrained character of legislative power, coupled with an electoral system which produced a lopsided majority in the legislature enabled the leaders of the majority party to use their vast powers to suppress or at least harass the opposition.”⁷⁹ During their 10 years in power (1950–1960), the DP implemented repressive policies against the RPP and its support groups, the bureaucracy, the intelligentsia, and students.⁸⁰ For example, the DP suppressed the RPP-friendly press, forced disobedient government officers including judges, and professors into early retirement, passed laws to suppress political opposition. Moreover the DP implemented policies by using the Ministry of Finance and Parliament to reduce the financial assets of the RPP which significantly restrained its capability to mount an election campaign.⁸¹ The reason of this suppression was reasonable fear of the DP that the civil and military bureaucracy continued to be loyal to the RPP even when it was no longer in power.⁸²

3.2.2. Military Coup and the Constitution of 1961

The Military regarded the DP’s growing power and its suppression towards political opponents as a threat to the Kemalist project and thus, it overthrew the DP government in 1960 and executed its top leaders.⁸³ There is one more explanatory factor that should be taken into account as a reason of the 1960 Coup. In the single party period, as the RPP had dominated both the political scene and the state bureaucracy, there was a unity of state elites

⁷⁸ Varol, Ozan. The Democratic Coup d’Etat, Harvard International Law Journal 53, no. 2 (2012): 323

⁷⁹ Ozbudun, Ergun and Genckaya, Omer Faruk, Democratization and the Politics of Constitution Making in Turkey, (Budapest: CEU Press, 2009): 13

⁸⁰ Belge, Ceren. Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, Law & Society Review 40, no. 3 (2006):659

⁸¹ Varol, Ozan. The Democratic Coup d’Etat, Harvard International Law Journal 53, no. 2 (2012): 324

⁸² Belge, Ceren. Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, Law & Society Review 40, no. 3 (2006):660

⁸³ Isiksel, Turkuler. Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism, International Journal of Constitutional Law 11, no.3(2013): 713

and political elites. After the rule of the DP the “unity of the elite” was broken and these two elites became rival camps.⁸⁴ Shambayati argues that the aim of the 1961 coup is to reunify the political and the state elites and to continue the modernization project that had been interrupted during the DP rule in the opinion of the state elites.⁸⁵

In June 1960, the DP was banned by Ankara Civil Court of General Jurisdiction (*Ankara Asliye Hukuk Mahkemesi*) as the Constitutional Court was not established at that time. All members of the DP cabinet, all the DP parliamentary representatives were arrested. It is interesting to note that although the major reason for the DP’s closure was the military regime of the 1960 coup, the justification of this measure was procedural. According to “Act of Associations” all political parties were obliged to hold a convention every year. The fact that the DP had failed to hold conventions every year was taken into account by the civilian court, and for this reason the party was shut down. High Justice Board (*Yüksek Adalet Divanı*) sentenced to death three members of the DP cabinet, and then they were executed.”⁸⁶

After seizing power, the Armed Forces declared that the intention of the coup was to “rescue the Turkish democracy from the unfortunate situation in which it found itself.” The Armed Forces committed to “hold fair and free elections as quickly as possible” and to transfer the power to the resulting winners of the election. According to the declaration, the National Unity Committee (NUC) which consisted of thirty eight officers would govern the country during the transition period.⁸⁷

The NUC decided to adopt a new and democratic constitution before returning to civilian rule.⁸⁸ The NUC invited five law professors to prepare a new constitution. This

⁸⁴ Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005):30

⁸⁵ Shambayati, Hootan and Kirdis, Esen, In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey, *Political Research Quarterly* 62, no.4(2009) :770

⁸⁶ Celep, Odul, *The Political Causes of Party Closures in Turkey*, *Parliamentary Affairs* (2012): 6

⁸⁷ Varol, Ozan. *The Turkish Model of Civil-Military Relations*, *International Journal of Constitutional Law* 11, no. 3 (2013): 735

⁸⁸ Bâli, Asli. *Courts and Constitutional Transition: Lessons from the Turkish Case*, *International Journal of Constitutional Law* 11, no.3(2013):669

Constitutional Commission incorporated the views of the military into the draft. After the Constitutional Commission completed the draft, a law professor who is known for his strong Republican credentials (Turhan Feyzioglu) was appointed to chair a commission that would determine the election rules for the Constituent Assembly, which would write the final version of the constitution. The Feyzioglu Commission did not prefer directly elected assembly composed of the representatives of political parties. Instead, he recommended that the seats of the Constituent Assembly be divided with a quota system to provide that freely elected party representatives could not constitute the majority of the members.⁸⁹

As a result, the 1961 Constitution was prepared by a Constituent Assembly comprised of two wings: the NUC as one and an indirectly elected House of Representatives comprised of civilian representatives as the other. “The House of Representatives consisted of the following members: (1) Ten members elected by the head of the state, (2) eighteen members selected by NUC, (3) members of the Council of Ministers, (4) 75 members indirectly elected from provinces, (5) representatives of two existing political parties, the RPP and Republican Peasant Nation Party, 79 members chosen by professional and certain civil society organizations. (representatives of the press, universities and judiciary, veteran associations, artisans’ and traders’ associations, youth representatives, trade unions, chambers of commerce and industry, teachers’ associations, agricultural organizations etc.)”⁹⁰ According to one estimate, 200 of the 265 members of the Assembly were members of the RPP.⁹¹

The 1961 Constitution was adopted by the Assembly and ratified by a referendum in which it collected 61.71% of the popular vote. As the Constituent Assembly was dominated

⁸⁹Belge, Ceren. Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, *Law & Society Review* 40, no. 3 (2006): 660, 661

⁹⁰ Ozbudun, Ergun. and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 14, 15

⁹¹Shambayati, Hootan. In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey, *Political Research Quarterly* 62 (2009): 770

largely by state elites (the military, the bureaucracy, and university professors) and the RPP, the 1961 Constitution reflects the basic political values and interests of them. Ergun Ozbudun argues that while greatly expanding civil liberties and granting extensive social rights to citizens, the Constitution also reflected a distrust of politicians and elective assemblies by creating an effective system of checks and balances. “These checks included the judicial review of the laws, strengthening the administrative courts, improving job security of civil servants including judges and granting administrative autonomy to certain public agencies.”⁹²

The 1961 Constitution embraced bicameralism and it divided the Grand National Assembly of Turkey, into the National Assembly and the Senate of the Republic (TSR). TSR was composed of 150 members elected by general ballot and non elected members. Non-elected members include (1) 15 members appointed by the President for 6 years (2) the former Presidents of the Republic (3) the former members of NUC who became life-time senators.⁹³

The intention of the framers was to limit the power of the legislature, which they viewed as subject to partisan capture and thus as a threat to Kemalist predominance, by strengthening judicial and other bureaucratic agencies.⁹⁴ For the same aim, the Constitutional Court was established. The Constitution empowered the Court to review the constitutionality of laws and the by-laws of the Turkish Grand National Assembly. The Constitution also authorized the Constitutional Court with the profound authority to permanently close political parties.⁹⁵ Some scholars including Hootan Shambayati explain the establishment of the Constitutional Court by using Hirschl’s hegemonic preservation thesis.⁹⁶

⁹² Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 16

⁹³ Ozbudun, Ergun. *The Constitutional System of Turkey 1876 to the Present* (US: Palgrave Mcmillan, 2011), 59

⁹⁴ Isiksel, Turkuler. *Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism*, *International Journal of Constitutional Law* 11, no.3(2013):714

⁹⁵ Varol, Ozan. *The Turkish Model of Civil-Military Relations*, *International Journal of Constitutional Law* 11, no. 3 (2013): 738

⁹⁶ Shambayati, Hootan. *In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey*, *Political Research Quarterly* 62 (2009): 768

Hirschl argues that transferring power to a high court can be interpreted as a conscious attempt of threatened elites to secure their previously acquired privileges by transforming them into rights.⁹⁷ To quote Hirschl:

Judicial empowerment through the fortification of rights may provide an efficient institutional way for hegemonic sociopolitical forces to preserve their hegemony and to secure their policy preferences even when majoritarian decision-making processes are not operating to their advantage.⁹⁸

By implementing this thesis to Turkish constitution making process, Aslı Bali argues that the establishment of the Constitutional Court is the part of the strategy to strengthen and defend privileges against democratic reversal through courts and constitutional provisions. As it is planned, in the next decades, the Constitutional Court played an important role in protecting the values and interests of the state elites.⁹⁹

“The Constitutional Court consisted of fifteen permanent and five substitute members. Eight of the fifteen permanent members would be selected by other appellate courts (Council of State, High Court, and Court of Accounts), three by Parliament, two by the Senate, and two by the President of the Republic.” As it can be seen, “the power to select a majority of the members on the Constitutional Court was given to the unelected judiciary, whose members were more likely to be aligned with the military’s policy preferences than were elected political actors.”¹⁰⁰ Ozan Varol and Hootan Shambayati argue that after the DP experience, the military supported the formation of a sympathetic Constitutional Court as they

Bâli, Asli. Courts and Constitutional Transition: Lessons from the Turkish Case, *International Journal of Constitutional Law* 11, no.3(2013): 670

⁹⁷Belge, Ceren. Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey, *Law & Society Review* 40, no. 3 (2006): 657

⁹⁸Hirschl, Ran. The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions, *Law & Social Inquiry* 25, no.1 (2000): 95

⁹⁹Bâli, Asli. Courts and Constitutional Transition: Lessons from the Turkish Case, *International Journal of Constitutional Law* 11, no.3(2013): 670

¹⁰⁰Varol, Ozan. The Democratic Coup d’Etat, *Harvard International Law Journal* 53, no. 2 (2012): 329

wanted to preserve their values and interests as state elites, which are likely to be threatened political elites.¹⁰¹

It is important to note that the 1961 Constitution gave the military a constitutional role for the first time by establishing National Security Council (*Milli Guvenlik Kurulu*, NSC).¹⁰² The establishment of NSC legitimized the military's active involvement in politics as an actor of the political system and guardian of the regime.¹⁰³ According to Article 111 of the 1961 Constitution:

The National Security Council shall consist of ministers as provided by law, the Chief of the General Staff and representatives of the armed forces. The president of the Republic shall preside over the National Security Council and in his absence this function will be discharged by the Prime Minister. The National Security Council shall communicate the requisite fundamental recommendations to the Council of Ministers with the purpose of assisting in the making decisions related to national security and coordination.¹⁰⁴

Duties of NSC defined in Article 111 had made it possible for the military elite to get directly involved in the governing of the country as governments were obliged to take into account the decisions taken by the NSC.¹⁰⁵

It is quite puzzling that even though the 1961 Constitution was drafted by a Constituent Assembly that is established during military regime, the initial form of the Constitution can be regarded as the most liberal of all the Turkish constitutions. In terms of basic rights, the 1961 Constitution gained inspiration from the documents of 20th-century rights revolution, including the European Convention on Human Rights, the Universal Declaration of Human Rights, and the 1949 German Constitution and it enshrined a relatively

¹⁰¹Varol, Ozan. The Democratic Coup d'Etat, Harvard International Law Journal 53, no. 2 (2012): 329
Shambayati, Hootan. In Pursuit of "Contemporary Civilization": Judicial Empowerment in Turkey, Political Research Quarterly 62(2009):768

¹⁰²Zürher, Erich Jan. Turkey a Modern History, (London: Tauris, 2004), 245

¹⁰³Uzgel, İlhan. Between Praetorianism and Democracy: The Role of the Military in Turkish Foreign Policy The Turkish Yearbook of International Relations 34 (2003):181

¹⁰⁴The 1961 Constitution, art. 111, sec. 2

¹⁰⁵Ete, Hatem, The Legal, Political and Sociological Roots of Tutelary Regime in Single-Party Period (PhD diss., Middle East Technical University, 2012):2

wide list of individual rights of “universalistic” character¹⁰⁶ “The Constitution expanded individual rights and liberties, expressly recognizing the right to privacy, the right to travel, the right to strike, and the freedoms of speech and assembly. The 1961 Constitution also strengthened the right to freedom of association, which led to the establishment of numerous autonomous civil society organizations and political parties.”¹⁰⁷

However, it is possible to see the traces of the militant democracy in the 1961 Constitution. Firstly, there are some provisions as to this effect in the general principles section of the constitution.¹⁰⁸ For example, it is stated in Article 2 of the Constitution that “the Turkish Republic is a nationalistic, democratic, secular and social state governed by rule of law, based on human rights.”¹⁰⁹ This provision excluded all kinds of totalitarian and religious rule. Likewise, the provision in Article 4 of the Constitution, which stated that the right to exercise such sovereignty could not be delegated to any one person, group or class prohibited the establishment of antidemocratic and communist regimes that advocate superiority of a class over others.¹¹⁰

In Article 20 of the 1961 Constitution concerning freedom of thought, it was stated that every individual was entitled to have his own opinions and think freely, that he was free to express and disseminate his thoughts and opinions through various media and that no individual should be coerced to disclose his thoughts and opinions. No restrictive rules were included in this article. Since this article did not contain any exceptions as to freedom of thought, it was argued that this freedom was adopted in the constitution without any limitations.

¹⁰⁶ Isiksel, Turkuler. Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3(2013): 713

¹⁰⁷ Varol, Ozan. The Turkish Model of Civil-Military Relations, *International Journal of Constitutional Law* 11, no.3(2013): 736

¹⁰⁸ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 140

¹⁰⁹ The 1961 Constitution, art. 111, sec.1

¹¹⁰ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 140

Unlike the 1982 Constitution, the 1961 Constitution did not involve an article stating the causes of overall limitations regarding fundamental rights and freedoms. As agreed by the majority of the scholars, Article 11 of the 1961 Constitution entitled “The Essence of Basic Rights” is like a guarantee which determines the limits of restrictions stated in the other articles. According to this article:

The fundamental rights shall be restricted by law only in conformity with the letter and the spirit of the Constitution. The law shall not infringe upon the essence of any right or liberty not even when it is applied for the purpose of upholding public interest, morals and order, social justice and as well as national security.¹¹¹

Apart from Article 20, which governed freedom of thought, Article 19 included some restrictions concerning expression of religious beliefs and opinions. According to the article:

No person shall be allowed to exploit and abuse religion or religious feelings or things considered sacred by religion in any manner whatsoever for the purpose of political or personal benefit, or for gaining power, or for even partially basing the fundamental social, economic, political and legal order of the state on religious dogmas.¹¹²

As is seen, this article aims to safeguard the expression of religious thought, which is a specific form of expression of thought.¹¹³

Militant devices for political parties can be found in Article 57 of the 1961 Constitution which determines the restrictions over the activities of political parties. According to this article:

The statutes, programs and activities of political parties shall be in accordance with the principle of democratic and secular republic which is based on human rights and basic principle of indivisibility of the state with its territory and nation. Parties failing to conform these provisions shall be permanently closed down.¹¹⁴

As it can be seen, although Article 20 did not contain any exceptions as to freedom of thought, Article 57 limited this freedom for political parties.¹¹⁵

¹¹¹ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 142

¹¹² The 1961 Constitution, art. 20, sec. 1

¹¹³ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 142

¹¹⁴ The 1961 Constitution, art. 19, sec. 1

¹¹⁵ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 145

3.2.3. Military Coup and Constitutional Amendments of 1971

Constitutional amendments adopted in 1971 following the 1971 coup changed the liberal nature of the 1961 Constitution in favor of authoritarianism.¹¹⁶ To be able to understand the underlying motivation of these amendments, it is essential to refer to the political conditions of the 1960s. After the Constitution's popular ratification in 1961, democratic elections for Parliament were held in October 1961. The RPP got 36.7 percent of the vote while the Justice Party (*Adalet Partisi*, JP) winning 34.8 percent, the Republican National Peasants Party (*Cumhuriyetçi Köylü Millet Partisi*) obtaining 14 percent, and the New Turkey Party (*Yeni Türkiye Partisi*) receiving 13.7 percent of the popular vote. After the elections, the NUC delegated power to democratically elected leaders, restoring procedural democracy in Turkey.¹¹⁷

Future parliamentary elections also created weak coalition governments.¹¹⁸ After several coalition governments, the JP –the successor of DP- came to power in 1965.¹¹⁹ In the late 1960s and early 1970s, Turkey experienced an economic recession, social unrest, violence between left-wing, Islamist, and nationalist groups, persistent strikes by factory workers, and a rising Islamist movement led by the National Order Party (*Millî Nizam Partisi*).¹²⁰ The social unrest and political instability experienced in this period, led the JP, the opposition RPP, and the military to blame these troubles on the permissiveness of the 1961 Constitution.¹²¹ According to Tim Jacoby “civilian and military leaders made common

¹¹⁶ Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2(2002): 55

¹¹⁷ Varol, Ozan. The Turkish Model of Civil-Military Relations, *International Journal of Constitutional Law* 11, no. 3 (2013): 738

¹¹⁸ *Ibid*, 739

¹¹⁹ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3(2013): 715

¹²⁰ Varol, Ozan. The Turkish Model of Civil-Military Relations, *International Journal of Constitutional Law* 11, no. 3 (2013): 741

¹²¹ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3(2013): 715

cause in attacking the liberality of the 1961 constitution [as] a luxury Turkey could ill afford.”¹²²

The Armed Forces forced Prime Minister Süleyman Demirel to resign by an ultimatum known as the “coup by memorandum” on 12 March 1971.¹²³ The ultimatum delivered by the military was directing the government to restore law and order in accordance with Kemalist principles or face military intervention. In response to the memorandum, Süleyman Demirel resigned and was replaced by a military-selected civilian leader, Nihat Erim, who was charged with selecting a cabinet of technocrats from outside of the political establishment to perform a military-backed program of reforms.¹²⁴

The Nihat Erim government adopted a series of constitutional amendments to tighten public order at the expense of the civil liberties promised by the 1961 Constitution.¹²⁵ The most important amendment was made in Article 11 and the purpose here was to turn this article into a general restriction ground for fundamental rights and freedoms.¹²⁶ According to Article 11(2):

Fundamental rights and freedoms can only be restricted by law in accordance with the word and spirit of the constitution for the purpose of protecting the indivisible integrity of the state with its territory and nation, the republic, national security, public order, public interest, public morality and public health, or for specific reasons stated in other articles of the constitution.¹²⁷

Thus, the objective of protecting the individual against the state as stated in the original form of Article 11 became one that was intended to protect the state against the individual.¹²⁸

¹²² Jacoby, Tim. *Social Power and the Turkish State*. (London: Frank Cass Publishers, 2004), 138

¹²³ Varol, Ozan. The Turkish Model of Civil-Military Relations, *International Journal of Constitutional Law* 11, no. 3 (2013): 741

¹²⁴ Bâli, Asli. Courts and Constitutional Transition: Lessons from the Turkish Case, *International Journal of Constitutional Law* 11, no.3(2013): 668

¹²⁵ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3(2013): 715

¹²⁶ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 143

¹²⁷ The 1961 Constitution, art. 11, sec. 1

¹²⁸ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 143

In spite of this extensive suppression of the liberal safeguards of the 1961 Constitution, neither the military nor the civilian governments that ruled the country during the 1970s were satisfied with the changes. In the years paving the way to the 1980 coup, the military and civilian governments implemented repressive policies that violated the spirit of the 1961 Constitution, which led to an obvious laxity of constitutional discipline.¹²⁹

3.2.4. The Military coup of 1980 and the Constitution of 1982

The inability of shifting coalition governments to sustain the peace during the 1970s culminated in the coup of 1980, and the National Security Council (NSC) seized power.¹³⁰ The political parties including the RPP, JP, the National Salvation Party (*Milli Selamet Partisi*) and the Nationalist Action Party (*Milliyetçi Hareket Partisi*) held responsible for the turmoil as a result of right and left wing conflict and were banned by the NSC. Political parties were allowed to perform their political activities ten years after the 1980 coup.¹³¹

After the military coup in 1980, the 1961 Constitution was suspended and the Consultative Assembly was appointed by the military government to prepare the constitution.¹³² Similarly to the 1960- 1961 Constituent Assembly, its structure was bicameral in which one of the chambers was the NSC itself. But the civilian chamber of the Consultative Assembly was less representative than its predecessor as all its members were appointed by the NSC.¹³³ As a result, state elites had more weight in the Consultative Assembly.

The constitutional draft was put to a referendum in 1982. While the 1961 referendum took place in a relatively free atmosphere due to the fact that those who opposed the constitution were able to express their views, the 1982 referendum followed a one-sided

¹²⁹ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3 (2013): 715

¹³⁰ Ibid, 716

¹³¹ Hakyemez, Yusuf Sevki. Containing the Political Space, Party Closures and the Constitutional Court in Turkey, *Insight Turkey* 10, no.2(2008): 136

¹³² Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2(2002):55

¹³³ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 19

campaign. Moreover, the 1982 constitutional referendum was combined with the presidential election. Yes vote for the Constitution was also an endorsement of the presidency of General Kenan Evren which implies that if the draft was rejected, the National Security Council regime would continue indefinitely. As a result, the Constitution was approved by 91.73 percent of the voters.¹³⁴

It is generally agreed that although both the 1961 and the 1982 Constitutions embraced the concept of militant democracy, the latter went much further in that direction than its predecessor.¹³⁵ It is possible to see traces of this concept starting from the preamble. “The 1982 Constitution sets forth the constitutional boundaries for ideological pluralism in its preamble through both juridical and meta-juridical references. These boundaries do not only clarify legal and political inspirations of the *pouvoir constituant*, but also the ideas, beliefs and resolutions which are to be regarded in the interpretation and implementation of the Constitution.”

The wording of the preamble rules that “the constitution should be understood to embody legal and political choices stated in the preamble.”¹³⁶ Moreover, according to Article 176 of the Constitution, the preamble is included in the Constitution and states the fundamental views and principles underlying the Constitution. Therefore, the Preamble gains more importance while interpreting the Constitution. Finally, Article 2 of the Constitution, which lists the characteristics of the republic, states that The Republic of Turkey is a republic based on the principles specified in the preamble.¹³⁷

The chief emphasis in the preamble to the 1961 Constitution was on independence, freedom and democratic rule of law, whereas the emphasis shifted to indivisibility, national

¹³⁴ Ibid, 20

¹³⁵ Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, *Democratization* 17, no. 1(2010): 126

¹³⁶ Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel (Ashgate:2009), 264

¹³⁷ The 1982 Constitution, art. 4, sec. 1

solidarity and protection of state in the 1982 Constitution.¹³⁸ It is stated in Paragraph 5 of the preamble that:

No protection shall be accorded to an activity contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk and that, as required by the principle of secularism, there shall be no interference whatsoever by sacred religious feelings in state affairs and politics.¹³⁹

Even this statement in the preamble alone may suffice to give clues in line with the approach of militant democracy as embodied in the 1982 Constitution regarding the limits of freedoms of expression and organization of various movements that contravene the principles of unitary state, democratic state and secular state.¹⁴⁰

In the 1961 Constitution, only the rule that the form of the state was a republic was kept as an irrevocable provision. In the 1982 Constitution, on the other hand, the scope of irrevocable provisions was extended and it was stated that the constitutional amendments within this scope could not even be proposed. One important reason why the scope of irrevocable provisions was extended was that this Constitution acted on the impulse of protecting the state.

According to Article 4 of the 1982 Constitution, the provision in Article 1 stating that the form of the state is a republic, the provision in Article 2 establishing the characteristics of the state and the sections in Article 3 on the integrity, official language, flag, national anthem and the capital city of the state cannot be amended. Thus, Article 2 of the Constitution took the fundamental characteristics of the Turkish Republic under strict protection, i.e. a democratic, secular and social state governed by the rule of law; respecting human rights and loyal to the nationalism of Atatürk. Article 3 of the Constitution, on the other hand, heavily

¹³⁸ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 163

¹³⁹ 1982 Constitution

¹⁴⁰ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 163

protects the indivisibility of the state with its territory and nation.¹⁴¹ Moreover, Article 3 declared that Turkish is the mother tongue (as opposed to the official language) of all citizens of Turkey and based on this article, certain languages, including Kurdish, were restricted by means of new set of laws.¹⁴² Therefore, these provisions reflect a typical aspect of the militant democracy as embodied in the 1982 Constitution.

In the first part of Article 5 of the Constitution, “safeguarding the independence and integrity of the Turkish nation”, “the indivisibility of the nation and the republic” was listed among the fundamental aims and duties of the state. More precisely, while fulfilling its duties the state will not allow ideas and organizations that cross the ideological limits stated by the Constitution. If this limit is crossed, then the right of the state to safeguard its political regime emanating from the Constitution will come into play.

Article 6(1) states that sovereignty is vested fully and unconditionally in the nation while clause 3 states that the right to exercise this sovereignty shall not be delegated to any individual, group or class. According to this article, due to the fact that sovereignty belongs unconditionally to the nation, it is impossible to establish theocratic administrations deriving sovereignty from a divine power. Moreover, it can be said that by prohibiting sovereignty of persons and classes, Article 6 intends to prevent parties aiming at sovereignty of a class, and all kinds of dictatorships.¹⁴³

It is generally argued that the basic philosophy of the 1982 Constitution was to protect the state and its authority against its citizens and groups rather than protecting individuals against encroachments of the state authority reflecting the deep distrust of the army towards civilian politicians. That is why “its articles on basic human rights in general and on individual freedoms in particular have been much more restrictive than those in

¹⁴¹ Ibid, 169

¹⁴² Watts, Nicole. Allies and Enemies: Pro-Kurdish Parties in Turkish Politics, 1990-94, *International Journal of Middle East Studies* 31, no.4(1999):635

¹⁴³ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 169

previous constitutions.”¹⁴⁴ Bulent Tanör argues that “the majority of human rights violations in Turkey since 1982 are constitutional; that is, they are sanctioned and supported by the constitution in one way or another.”¹⁴⁵

According to Article 2 of the Constitution, The Republic of Turkey is a ... state governed by the rule of law bearing in mind the concepts of public peace, national solidarity and justice, respecting human rights. When the statements in the provision of Article 2 before the phrase ‘respecting human rights’ are taken into account, the limits of human rights within the 1982 Constitution can be understood. Although the Republic of Turkey respects human rights, this respect has to remain within the limits of the concepts of public peace, national solidarity and justice and must not go beyond.¹⁴⁶

Article 13 of the Constitution determines the principles for restriction of fundamental rights and freedoms: According to initial form of this article:

Fundamental rights and freedoms can be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution for the purpose of protecting the indivisible unity of the state with its territory and nation, national sovereignty, the republic, national security, public order, public peace, public interest, public health and public morality.¹⁴⁷

Moreover, original text of Article 14 includes the following provision regarding the abuse of fundamental rights and freedoms:

None of the rights and liberties embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, destroying fundamental rights and liberties, of placing the government of the State under the control of an individual or a group of people, or establishing the hegemony of one social class over others, or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas.¹⁴⁸

¹⁴⁴ Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2(2002): 56

¹⁴⁵ Isiksel, Turkuler. Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3(2013): 720

¹⁴⁶ Hakyemez, Yusuf Sevki. *Militan Demokrasi Anlayisi ve 1982 Anayasasi*, (Ankara: Seckin, 2009), 153

¹⁴⁷ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 51

¹⁴⁸ *Ibid*, 58

Freedom of thought is regulated in two articles of the 1982 Constitution. Article 25 of the Constitution regulates the freedom of thought and opinion whereas Article 26 of the Constitution regulates the freedom of expressing and disseminating thought. Article 25 states that everyone has the right to freedom of thought and opinion without any specific restrictions. While Article 26 of the Constitution indicates that everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media. Implications of militant democracy could be seen in qualified restriction grounds regulated by second clause of the Article since they include: “protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the state.”¹⁴⁹

Another article in the Constitution that is closely related to the freedom of thought is Article 24, which regulates freedom of religion and conscience. According Article 24(1), everyone has the right to freedom of conscience, religious belief and conviction. The last clause of Article 24 determines the limits of freedom of religious belief in the context of secularism.¹⁵⁰ To quote:

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.¹⁵¹

This provision, which is the most important basis for the principle of secularism in the 1982 Constitution, is intended to prevent efforts aimed at basing the social, political, economic and legal order of the state on religious rules, and religious abuses performed to this end.¹⁵²

¹⁴⁹Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel(Ashgate:2009), 284

¹⁵⁰Hakyemez, Yusuf Sevki. Militan Demokrasi Anlayisi ve 1982 Anayasasi, (Ankara: Seckin, 2009), 174

¹⁵¹The 1982 Constitution, art. 20, sec. 1

¹⁵²Hakyemez, Yusuf Sevki. Militan Demokrasi Anlayisi ve 1982 Anayasasi, (Ankara: Seckin, 2009), 174

1982 constitution recognizes in Article 68 that political parties, as ‘indispensable elements of democratic political life’, can be formed without prior permission, while they are under obligation to pursue their activities in accordance with the provisions set forth in the constitution and the law. Boundaries for political parties are identified in the Article 68(4): To quote:

The statutes and programmes, as well as the activities of political parties shall not be in conflict with the independence of the state, its indivisible integrity with its territory and nation, human rights, the principles of equality and rule of law, sovereignty of the nation, the principles of the democratic and secular republic; they shall not aim to protect or establish class or group dictatorship or dictatorship of any kind, nor shall they incite citizens to crime.

Article 69(4) states that:

The dissolution of political parties is decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic. The permanent dissolution of a political party is to be decided when it is established that the statute and programme of the political party violate the constitutional boundaries regulated in Article 68(4).¹⁵³

Moreover 1982 Constitution brought some changes to the institutions established by 1961 Constitution. One of them was about the appointment procedure of the members of the Constitutional Court. According to initial form of the Article 146 the Constitutional Court consists of eleven permanent and four substitute member both appointed by the President of the Republic based on nominations by the other high courts, including the two military high courts, and the Council of Higher Education. As it can be seen, different from the 1961 Constitution, Parliament has no role in the appointment procedure of judges.¹⁵⁴ Secondly, the initial form of Article 118 increased the numbers of military members in the National Security Council and stressed that “the decisions of the Council should be given priority consideration by the Council of Ministers”, which means that the decisions of Council is binding.¹⁵⁵ By

¹⁵³ The 1982 Constitution, art. 68, 69, sec.4

¹⁵⁴ Shambayati, Hootan. The Turkish Constitutional Court and the Justice and Development Party, *Middle Eastern Studies* 48, no.1 (2012):110

¹⁵⁵ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 23

these changes, the role of the National Security Council in the governing of the country further strengthened.¹⁵⁶

After the military coup National Security Council had created a new political system through 600 legal regulations passed between the coup and 6 December 1983 the day of the first meeting of the newly elected Assembly. Some of these laws such as Law of Associations and Law on Political Parties are subject to criticisms stating that they are even more authoritarian towards fundamental rights and freedoms than 1982 Constitution.¹⁵⁷ In addition, Provisional Article 15(3) of the 1982 Constitution had exempted the laws made in this period from constitutional review until 2001 Amendments I will explain below.¹⁵⁸ I will discuss the controversies between the Law on Political Parties and the 1982 Constitution under Legal Procedures and Regulations Related with Party Closures section.

3.2.5. Political and Constitutional developments 1982- 2001

The military decided to return to civilian rule and announced the election date as 6 November 1983. However, the military intervened into the election process and vetoed 12 parties among 15 parties founded before elections.¹⁵⁹ As a result only three parties entered the elections namely, the Nationalist Democracy Party (*Milliyetçi Demokrasi Partisi*) which is founded by generals, the Populist Party (*Halkçı Parti*) that is encouraged by generals to channel the leftist votes, and the Motherland Party (*Anavatan Partisi*) that was given ‘permission’ to enter the elections.¹⁶⁰

The Motherland Party won the elections by getting 45 per cent of the vote and Turgut Ozal became prime minister, although the military represented by NSC kept a close

¹⁵⁶ Kocacioglu, Dicle. Progress Unity and Democracy: Dissolving Political Parties in Turkey, *Law and Society Review* 38, no.3(2004): 436

¹⁵⁷ European Commission for Democracy through Law (Venice Commission), *Constitutional Implications of Accession to European Union*, (Council of Europe Publishing, Strasbourg, 1999), 103

¹⁵⁸ Oder, Bertil Emrah. Turkey in *The Militant Democracy Principle in Modern Democracies*, ed. Markus Thiel (Ashgate:2009), 300

¹⁵⁹ Zürcher, Erich Jan. *Turkey a Modern History*, (London: Tauris, 2004), 282

¹⁶⁰ Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005), 45

watch.¹⁶¹ The rule of the Motherland Party continued until the 1991 elections without interruption.¹⁶² During its rule the Motherland Party did not attempt to make constitutional amendments. In his speeches Turgut Ozal stressed that the new institutions created by the 1982 Constitution should be given a chance to function for a time before considering making amendments.¹⁶³

It is important to mention that starting from the post-1980s political Islam and Kurdish nationalism perceived as Turkey's most important challenges. Kurdish movements asked for minority rights such as the right to education in mother tongue thereby challenging the taken-for-granted conceptions of a monolithic nation governed by the Turkish state. Kurdish nationalist parties closed down by the Constitutional Court based on their activities against the territorial and national integrity of the country. These parties were seen "as organically related to and/or increasing the support base for the armed struggle in southeastern Turkey between the Turkish army and the Kurdish separatist guerilla forces." Islamic political groups challenged the exclusion of Islam from public sphere and questioned a variety of issues from bans on women wearing headscarves in public sphere to restrictions on public prayer. The Constitutional Court closed these parties as it perceived them as a threat to principle of secularism.¹⁶⁴

True Path Party (*Dogru Yol Partisi*) led by Suleyman Demirel won the 1991 elections by gaining 27 percent of votes.¹⁶⁵ It formed a coalition government with Social Democrat Populist Party (*Sosyal Demokrat Halkci Parti*).¹⁶⁶ Although both parties promised

¹⁶¹ Zürher, Erich Jan. *Turkey a Modern History*, (London: Tauris, 2004), 282

¹⁶² Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005), 46

¹⁶³ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 31

¹⁶⁴ Kocacioglu, Dicle. *Progress Unity and Democracy: Dissolving Political Parties in Turkey*, *Law and Society Review* 38, no.3(2004): 440

¹⁶⁵ Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005), 50

¹⁶⁶ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 34

radical constitutional changes in their election campaigns, the 1995 constitutional amendments were below expectations as they brought no improvements regarding protection of fundamental rights and freedoms.¹⁶⁷

After 1995 elections the Welfare Party (*Refah Partisi*, RP) became the largest party in parliament by gaining 21.4 per cent of the popular vote and 158 seats in the 550 seat unicameral assembly. In June 1996 it formed a coalition government with the True Path Party, and leader of the RP, Necmettin Erbakan became Turkey's first Islamist prime minister.¹⁶⁸ During its rule the RP challenged the concept of secularism and Islamic dress and symbols started to enter to public sphere. It attempted to allow women to wear the headscarf in universities and public offices. Erbakan invited some religious order leaders to his residence for dinner during Ramadan. More importantly, Erbakan and members of the RP made public speeches stating their will to bring sharia order to the country. These policies of the RP created worries on the side of the military-bureaucratic elite and the secular groups at large.¹⁶⁹

The reaction of the military against the challenge of the RP to the concept of secularism was harsh. On 4 February the military diverted a column of tanks on the streets of Ankara to remind the RP the possibility of a coup.¹⁷⁰ At the meeting of NSC on 28 February 1997 which was later named and known as the "post-modern coup" the military asked the government to implement certain policies against the rise of political Islam.¹⁷¹ The measures included decisions demanding the closure of primary schools of divinity for clerical personnel

¹⁶⁷Ibid, 40

¹⁶⁸Jenkins, Gareth. Continuity and Change: Prospects for Civil–Military Relations in Turkey International Affairs 83, no. 2 (2007): 345

¹⁶⁹ Altunışık, Meliha Benli and Tür, Özlem, Turkey Challenges Of Continuity and Change, (USA: RoutledgeCurzon, 2005), 57

¹⁷⁰Jenkins, Gareth. Continuity and Change: Prospects for Civil–Military Relations in Turkey International Affairs 83, no. 2 (2007): 345

¹⁷¹ Altunışık, Meliha Benli and Tür, Özlem, Turkey Challenges Of Continuity and Change, (USA: RoutledgeCurzon, 2005), 60

(Imam Hatip Schools) and curbs on the Islamist media.¹⁷² Erbakan signed the proposals despite some postponement.¹⁷³ However, this move did not change the fate of the party. On 22 May 1997 the Chief Prosecutor started the procedure of closure by applying the Constitutional Court on the grounds that the RP was attempting to undermine the principle of secularism. The Court closed the party on the same ground on 16 January 1998.

Democratic Left Party (*Demokratik Sol Parti*) won the 1999 elections by gaining 21 per cent of the votes and it formed a coalition government with the Motherland Party and Nationalist Action Party.¹⁷⁴ The 2001 Amendments considered as the most comprehensive modification in the 1981 Constitution was enacted during their rule.¹⁷⁵ These amendments were seen as a prerequisite of meeting the political criteria for the EU candidacy.¹⁷⁶

The 2001 Amendments changed Article 13 which regulates the principles for restriction of fundamental rights and freedoms. The 2001 amendment deleted the general grounds for restriction.¹⁷⁷ To quote the amended text:

Fundamental rights and liberties may be restricted only by law and solely on the basis of the reasons stated in the relevant articles of the constitution without impinging upon their essence. These restrictions shall not conflict with the letter and the spirit of the Constitution, the requirements of democratic social order and the secular Republic, and the principle of proportionality.¹⁷⁸

As it can be seen the amendment not only abolished the general grounds for restriction in the initial text but also it brought the principle of the protection of the essence of fundamental rights and the principle of proportionality. Although both of these principles were being used by the Constitutional Courts before amendment, their explicit constitutional

¹⁷²Jenkins, Gareth. Continuity and Change: Prospects for Civil–Military Relations in Turkey *International Affairs* 83, no. 2 (2007): 345

¹⁷³ Altunışık, Meliha Benli and Tür, Özlem, *Turkey Challenges Of Continuity and Change*, (USA: RoutledgeCurzon, 2005), 60

¹⁷⁴ Ibid, 62

¹⁷⁵ Gonenc, Levent. The 2001 Amendments to the 1982 Constitution of Turkey, *Ankara Law Review* 1, no.1(2004): 89

¹⁷⁶ Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 49

¹⁷⁷ Ibid, 51

¹⁷⁸ The 1982 Constitution, art. 13, sec. 1

recognition provides an additional guarantee for the protection of fundamental rights and liberties. After this amendment Article 13 ceased to be a general restrictive article and became a general protective article.¹⁷⁹

After the 2001 Amendments Article 14 is regulated as follows:

None of the rights and freedoms embodied in the Constitution shall be exercised for activities undertaken with the aim of violating the indivisible integrity of the State with its territory and nation, and endangering the existence of the democratic and secular Republic based on human rights.

No provision of the Constitution shall be interpreted in a manner that would enable the State or individuals to destroy the fundamental rights and freedoms embodied in the Constitution, or engage in an activity with the aim of restricting them more extensively than is stated in the Constitution.

The sanctions to be applied against those who undertake activities in conflict with these provisions are prescribed by law.¹⁸⁰

With this amendment many of the conditions which constituted an abuse of rights under the original version of the Article were eliminated.¹⁸¹

Amendment in Article 69(6) intended to make the dissolution of political parties more difficult by bringing “focal point criteria” that the Constitutional has to take into account.¹⁸² According to Article 69(6):

The dissolution of a political party on account of its activities contrary to the provisions of the fourth paragraph of Article 68 may be decided only when the Constitutional Court determines that it has become a focal point of such activities.¹⁸³

Another amendment considered an important step forward in the democratization process is abolishment of Provisional Article 15, which had been one of the most controversial issues since 1983.¹⁸⁴ This amendment gains importance if we consider that Provisional Article 15 is the reason of inability of the Constitutional Court to review Law on Political Parties which brings extensive prohibitions related with freedom of political

¹⁷⁹Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 51

¹⁸⁰The 1982 Constitution, art. 14, sec. 1

¹⁸¹Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 52

¹⁸²Ibid, 58

¹⁸³The 1982 Constitution, art. 69, sec. 4

¹⁸⁴Ozbudun, Ergun and Genckaya, Omer Faruk, *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 61

association. In general, the constitutional analysis of the Turkish ‘militant democracy’ shows that liberal and illiberal tendencies coexist at the same time in the Constitution after amendments.¹⁸⁵

¹⁸⁵ Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel(Ashgate:2009), 307

CHAPTER 4: The Party Closure Decisions of the Turkish Constitutional Court Read in the Light of the ECHR Judgments

In this part of my thesis I would like to find an answer to my research question “What is the role of the Constitutional Court’s interpretation in the practice of militant democracy in Turkey and especially in frequent closure of the political parties?” by focusing on the party closure decisions of the Constitutional Court. After its establishment in 1961, the Constitutional Court closed 26 parties with a total of 44 prohibition requests initiated by the Chief Prosecutor.¹⁸⁶ The Islamist parties were closed as they violated the principle of secularism. Violation of the principle of the indivisible integrity of the state with its territory and nation was the reason of the closure of Kurdish nationalist parties. Interestingly, socialist/communist parties were closed not only because they infringed the principle of the indivisible integrity of the state with its territory and nation, but also because of the socialist communist ideology they embrace.¹⁸⁷

As I showed in the section on the Legal Procedures and Regulations Related with Party Closures, Constitution and the Law on Political Parties provide a wide range of permissible prohibitions on political parties. This might be one of the reasons of the frequent closure of political parties. I argue that together with this fact, the Court’s interpretation of the Constitution and the Law on Political Parties should also be taken into account to be able to explain the practice of frequent party closures in Turkey.

Turkish Constitutional Court is subject to the criticisms that it interprets the long list of prohibitions in the Constitution and the Law on Political Parties with excessive rigidity.¹⁸⁸

¹⁸⁶ Isik, Huseyin Murat. *Anaya Mahkemesi Kararlarinda Devletin Resmi Ideolojisi*, (Ankara: Adalet Yayınevi, 2012), 490

¹⁸⁷ Celep, Odul, *The Political Causes of Party Closures in Turkey*, *Parliamentary Affairs* (2012) : 10

¹⁸⁸ Ozbudun, Ergun. *Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights*, *Democratization* 17, no. 1(2010): 126

Scholars argue that the reason of the rigidity of the Constitutional Court is that it decides to dissolve any political party that defends or expresses a view contrary to the state ideology.¹⁸⁹ Zuhtu Arslan calls this as ‘ideology-based’ paradigm which has led the Court to favor the state and to reflect a positivist, one dimensional, monolithic, and authoritarian outlook. Derya Bayir furthers the argument of Arslan, stating that the Court’s ‘ideology-based’ legal paradigm is apparent in the historical references and definitions it uses in its reasoning.¹⁹⁰ I think this criticism gains even more importance if we take into account the argument that we followed through the section on Militant Democracy in the Evolution of the Turkish Constitutionalism, which can be summarized as the insight that the Constitutional Court is one of the most important institutions of the state elites apparatus, together with military, which tries to preserve the state ideology from Kurdish nationalism and Islamic revivalism.¹⁹¹

In this part I will show if and how the Constitutional Court acts to preserve state ideology by using its reasoning in the process of banning parties. I will focus on the primary sources, the decisions of the Constitutional Court published in Turkish language, which can be found online in the official web-site of the Turkish Constitutional Court. Discussing the reasoning of the Court will shed light if the threats stemming from the programmes and activities of the political parties can be understood in a more liberal way. Moreover, I would like to discover if there is -within the Turkish constitutional order- a possibility to interpret the regulations in the Constitution and the Law on Political Parties different from the Constitutional Court.

Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2(2002): 54

¹⁸⁹ Arslan, Zuhtu. Conflicting Paradigms: Political Rights in the Turkish Constitutional Court, *Middle Eastern Studies* 11, no.1(2002): 11

¹⁹⁰ Bayir, Derya. Negating Diversity: Minorities and Nationalism in Turkish Law, (PhD diss., Queen Mary University, 2010): 235

¹⁹¹ Isiksel, Turkuler. Between Text and Context: Turkey’s Tradition of Authoritarian Constitutionalism, *International Journal of Constitutional Law* 11, no.3(2013): 713

I will also use the judgments of the European Court of Human Rights about the party closure decisions of the Turkish Constitutional Court. As my focus in this part is decisions of the Turkish Constitutional Court, I will not follow the procedure and legal regulations of the ECHR while giving its judgments and I will mostly focus on its criticisms. The ECHR has heard nine cases against Turkey concerning political party closures and has ruled against the decisions of the Turkish Constitutional Court in all cases except the Islamist Refah Party Case. Especially, the ECHR pointed out to the Turkey's it concluded that Turkey violated the 10th and 11th articles of the European Convention.¹⁹²

According to Article 10(1) of the Convention “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” 10(2) determines the limit of this freedom as it states that:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime ... or for maintaining the authority and impartiality of the judiciary.

Article 11(1) states that “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others...” Article 11(2) of the Convention brings similar restrictions with Article 10 (2) to these rights such as ‘being necessary in a democratic society’, ‘being in the interests of national security’ and public safety.¹⁹³

This chapter consists of 4 sections. Section one I will point out legal regulations that take part in the Constitution and Law on Political Parties. In sections 2 - 4 I will analyze decisions regarding three political parties, namely: Freedom and Democracy Party (*Ozgurluk ve Demokrasi Partisi* OZDEP), United Communist Party of Turkey (*Turkiye Birlesik*

¹⁹² Abulkareem, Fahil. The European Court of Human Rights and the Judgments against Turkey , (MA diss. Ukraine Kharkov University, 2010):50

¹⁹³European Convention on Human Rights

Komunist Partisi, TBKP) and Welfare Party (*Refah Partisi*, RP). The choice of cases is straightforward: they focus on interpretation and militant protection of the three founding principles of the Turkish constitutional regime. In the second section, I will analyze the Court's decision about OZDEP which is a Kurdish nationalist party. In this section, I will focus on the alleged violation of the principle of the indivisible integrity of the state with its territory and nation. In the third section I will focus on Islamist RP case. I will discuss violation of the principle of secularism as a reason of party closure. In the fourth section I will be able to discuss the Court's approach regarding the regulations against class-based rule by focusing on socialist TBKP.

4.1. Legal Procedures and Regulations Related with Party Closures

The procedures and the legal grounds for the closure of political parties by the Constitutional Court can be found in the Constitution and the Law on Political Parties adopted under the military regime in 1983.¹⁹⁴ According to Article 69(4) of the Constitution the closure of political parties is finally decided by the Constitutional Court after the Chief Prosecutor initiates the closure procedure against the party.¹⁹⁵ Article 99 of Law on Political authorizes the Chief Prosecutor to initiate cases ex officio. The Ministry of Justice and political parties may ask from the Chief Prosecutor to take action but it is the Prosecutor who will finally decide to initiate the procedure by evaluating if there is enough evidence.¹⁹⁶

The Venice Commission criticizes this procedure arguing that the power to initiate closure procedure should not be given only to the prosecuting authorities. According to the Commission due to political nature of such cases, initiation of the

¹⁹⁴ Algan, Bulent. Dissolution of Political Parties by The Constitutional Court in Turkey: An Everlasting Conflict between Court and The Parliament, AUHFD 60, no. 4 (2011) : 812

¹⁹⁵ The 1982 Constitution, art. 69, sec. 4, cl. 4

¹⁹⁶ Law on Political Parties, art. 99

procedure should not be the automatic legal consequence of the fulfillment of certain legal criteria. There should be political and democratic check or balance to ensure element of direct or indirect democratic control.¹⁹⁷

The Constitutional Court decides on closures based on the regulations in the Constitution and Law on Political Parties. Bulent Algan and Ergun Ozbudun argue that although the provisions of the 1982 Constitution include restrictive rules about the closure of political parties, the Law on Political Parties includes even more restrictive ones, which apparently contradict with the constitution, as I will analyze some of them below.¹⁹⁸

The fourth part of the Law on Political Parties is called “The Prohibitions Related with Political Parties” and it consists of four categories, namely:

- (i) prohibitions related to the protection of democracy
- (ii) protection of the characteristics of the nation state
- (iii) protection of Ataturk’s (Mustafa Kemal Ataturk) principles and reforms and the characteristics of the secular state
- (iv) other prohibitions.¹⁹⁹

Articles 68 and 69 of the 1982 Constitution are the main provisions of the Constitution related to the political parties.²⁰⁰ They settle rules about party closures, accordingly political parties can be closed by the Constitutional Court as a result of violating these constitutional prohibitions.²⁰¹ While these articles constitute the main constitutional

¹⁹⁷The Venice Commission, 2009, Opinion on The Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, 7

¹⁹⁸Algan, Bulent. Dissolution of Political Parties by The Constitutional Court in Turkey: An Everlasting Conflict between Court and The Parliament, AUHFD 60, no. 4 (2011) : 812
Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, Democratization 17, no.1 (2010): 128

¹⁹⁹Law on Political Parties

²⁰⁰Yargic, Sinem. The Need to Amend Turkish Legislation to Ensure Political Participation in Turkey, Yönetim Bilimleri Dergisi 11, no. 21(2013): 207

²⁰¹Algan, Bulent. Dissolution of Political Parties by The Constitutional Court in Turkey: An Everlasting Conflict between Court and The Parliament, AUHFD 60, no. 4 (2011) : 812

provisions on party prohibition, they must be seen in relation to the other articles of the Constitution, with which they are closely related.²⁰²

According to Article 68(4) of the Constitution “The statutes and programmes, as well as the activities of political parties shall not be in conflict with:

- (i) the independence of the state
- (ii) its indivisible integrity with its territory and nation
- (iii) human rights
- (iv) the principles of equality and rule of law
- (v) sovereignty of the nation
- (vi) the principles of the democratic and secular republic
- (vii) the prohibition of establishing class or group dictatorship²⁰³

Article 69(4) states that: The closure of political parties is decided finally by the Constitutional Court after the filing of a suit by the office of the Chief Public Prosecutor of the Republic and these decisions are taken by three-fifths majority according to Article 149(1). Article 69(5) lays out criteria for the closure of political parties by referring to 68(4).²⁰⁴ According to this article “The permanent closure of a political party is to be decided when it is established that the statute and programme of the political party violate the provisions of the Article 68(4).”²⁰⁵

Under Article 69(6) “the decision to dissolve a political party permanently owing to activities violating the provisions of Article 68(4) may be rendered only when the Constitutional Court determines that the party in question has become a centre for the execution of such activities. This article also describes what “becoming a centre” means:

A political party shall be deemed to become the centre of such actions only when such actions are carried out intensively by the members of that party or the situation is shared implicitly or explicitly by the grand congress, general chairmanship or the central decision-making or administrative organs of that

²⁰²Venice Commission, Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, 2009: 17

²⁰³The 1982 Constitution, art. 68, sec. 4

²⁰⁴Yargic, Sinem. The Need to Amend Turkish Legislation to Ensure Political Participation in Turkey, *Yönetim Bilimleri Dergisi* 11, no. 21(2013):207

²⁰⁵The 1982 Constitution, art. 69, sec. 4, cl. 4

party or by the group's general meeting or group executive board at the Turkish Grand National Assembly or when these activities are carried out in determination by the above-mentioned party organs directly.²⁰⁶

In other words, the Constitution differentiates between dissolving a party based on its statutes or programme on the one hand and its activities on the other hand. In order to decide the closure of a political party based on its activities being contrary to 68(4), the Constitutional Court has to approve that party has become the center of such activities committed with enough frequency and determination.²⁰⁷

The core protected principles of Article 68(4) - indivisible integrity of the state with its territory and nation, and secularism – are restated in Article 2 of the Constitution which states that “the Republic of Turkey is a ...secular state” and Article 3 (1), according to which “the Turkish state, with its territory and nation, is an indivisible entity”. These articles belong to the non-amendable provisions of the Constitution as Article 4 prohibits even proposing their amendment.²⁰⁸

The principle of the indivisible integrity of the state with its territory and nation can be analyzed under two headings: the territorial integrity and the national integrity. The territorial integrity is further specified in the Law on Political Parties.²⁰⁹ According to Article 80 :“Political parties shall not aim to change the principle of the unitary state on which the Turkish Republic is founded, nor carry on activities in pursuit of such an aim.”

Ergun Ozbudun rightly argues that it is debatable whether this provision is a simple extension of the constitutional principle or a new principle beyond the mandate of the Constitution. This is because it can be argued that the principle of the territorial

²⁰⁶ Ibid, art. 69, sec. 4, cl. 6

²⁰⁷ Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2 (2002): 59

²⁰⁸ The 1982 Constitution, art. 2, 3, 4, sec. 1

²⁰⁹ Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, *Democratization* 17, no.1 (2010): 128

integrity of the state does not necessarily require the principle of unitary state as it can be reconciled with federal or regional forms of government. Therefore, this provision of the Law on Political Parties seems to bring new restrictions to political parties that are not stated in Article 68(4) of the Constitution.²¹⁰

The principle of the national integrity of the state specified in Articles 81, 82, and 83 of the Law on Political Parties. The most important one is Article 81 which provides the basis for many prohibition rulings of the Constitutional Court entitled “the prevention of creating minorities”²¹¹. According to this article: “Political parties:

- a) Cannot maintain that there are minorities in the territory of the Republic of Turkey, based on differences of national or religious culture, race, or language.
- b) Cannot pursue the aim or engage in activities to harm national unity by way of creating minorities in the territory of the Republic of Turkey through protecting, developing or spreading languages and cultures other than the Turkish language or culture.
- c) Cannot use or distribute posters, placards, audio and video tapes, brochures and declarations written in languages other than Turkish in the writing and publishing of their statutes and programs, congresses, open or closed hall gatherings, public meetings and propaganda activities; nor can they remain indifferent to those actions perpetrated by others. However, their statutes and programs may be translated into a foreign language not prohibited by law.²¹²

If we take into account that minorities are sociological realities, it is fair to argue that Article 81 of the Law on Political Parties is based on the fallacy that they can be superficially created by political parties or conversely, banned by judicial decisions.²¹³ Many states recognize “minorities” without regarding them as threatening the “integrity” of the state.²¹⁴ Both Ozbudun and the Venice Commission Report argue that Article 81 of the Law on

²¹⁰Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, *Democratization* 17, no.1 (2010): 128

²¹¹ Ibid, 129

²¹² Law on Political Parties, art. 81

²¹³Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, *Democratization* 17, no.1 (2010): 130

²¹⁴European Commission for Democracy through Law (The Venice Commission), *Opinion on The Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey*, (2009): 18

Political Parties introduces a prohibition that goes further than Article 68 (4) of the Constitution and therefore it is clearly unconstitutional.²¹⁵

The principle of secularism is protected by Article 4, 14, 24(4) and 147 of the Constitution together with Article 68(4). Especially Article 24(4) is important as it determines the limits of freedom of conscience, religious belief and conviction.²¹⁶ According to this article:

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.²¹⁷

The reflections of this principle can be found in Articles 84, 85, 86, 87, 88, and 89 of the Law on Political Parties. “These provisions include the protection of Ataturk’ s principles and reforms (Art. 84), respect for Ataturk (Art. 85), protection of the principles of secularism and the prohibition of the advocacy of the return of khilafat (temporal and spiritual head of all Muslims held by the Ottoman sultans from 1517 to 1924 when it was abolished) (Art. 86), the prohibition of the exploitation of religion and things held sacred by religion (Art. 87), prohibition of religious demonstrations (Art. 88), and the preservation of the status of the Presidency of Religious Affairs (Art.89).”²¹⁸

Article 96(3) states that “[p]olitical parties shall not be formed with the name ‘communist’, ‘anarchist’, ‘fascist’, ‘theocratic’ or ‘national socialist’, the name of a religion, language, race, sect or region, or a name including any of the above words or similar ones.”²¹⁹ This article also brings new prohibitions that are not stated in the Constitution.

²¹⁵Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, Democratization 17, no.1 (2010): 128
The Venice Commission, Opinion on The Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, (2009): 18

²¹⁶ Kahraman, Mehmet and Caliskan, Zekeriya, Türkiye’de Siyasal Partilerin Hukusal Statüsü ve Siyasal Partilerin Kapatılması Rejimi, Dogu Anadolu Bolgesi Calismalari,(2007): 127

²¹⁷The 1982 Constitution, art. 24, sec. 1

²¹⁸Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, Democratization 17, no.1 (2010): 131

²¹⁹Law on Political Parties, art. 96

Because of these regulations scholars argue that the Law on Political Parties is even more authoritarian towards fundamental rights and freedoms than 1982 Constitution.²²⁰ However, it was not possible for the Constitutional Court to cancel these articles because Provisional Article 15(3) of the 1982 Constitution had exempted this law from constitutional review until 2001 Amendments.²²¹

As it can be seen the Constitution and the Law on Political Parties provide a wide range of permissible prohibitions on political parties. This might be one of the reasons of the frequent closure of political parties. For example, if we consider Article 96(3) of Law on Political Parties which strictly prohibits political parties to be formed with the name ‘communist’ in their name, it seems like the Court has no other option than directly implement this law as I will analyze under third chapter. At the same time if we consider the values that are trying to be protected in Article 68(4) of the Constitution, such as “the independence of the state” and “sovereignty of the nation” it is fair to argue that they are vague terms and in case of the Court bases its decision to this article only, it has a large power of interpretation. To be able to explain the reason of the frequent party closures in Turkey it is important to differentiate the strictness of the regulations and the Courts rigid interpretation of laws. So it is essential to make an empirical study based on a detailed evaluation of the decisions of the Court decisions.

4.2. OZDEP Case

The Constitutional Court closed a series of Kurdish nationalist parties for the reason that they infringed the principle of the indivisible integrity of the state with its territory and nation. The first party was People’s Labour Party (*Halkın Emek Partisi*), formed on 7 June

²²⁰ European Commission for Democracy through Law(Venice Commission), Constitutional Implications of Accession to European Union, (Council of Europe Publishing, Strasbourg, 1999), 103

²²¹ Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel (Ashgate:2009), 300

1990. When closure procedure of People's Labour Party was started, its members founded OZDEP as a successor party on 19 October 1992. However, the Chief Prosecutor applied to the Constitutional Court to dissolve OZDEP on the grounds that its programme also sought to undermine the principle of the indivisible integrity of the state with its territory and nation and the principle of secularism.²²² OZDEP was dissolved by the Constitutional Court on 11 November 1993. In OZDEP case, I will focus on the arguments of the Constitutional Court regarding the principle of the state integrity, as I will discuss the Court's decision about violation of the principle of secularism under the RP case.

4.2.1. Claims of the Chief Prosecutor in the Indictment

The procedure of OZDEP's closure started with the indictment of the Chief Prosecutor who initiated the procedure of dissolving party claiming that some parts of the party programme were apt to undermine both the indivisible integrity of the state with its territory and nation and the principle of secularism.

The Chief Prosecutor uses the following passages in the party programme of OZDEP as evidence for the indictment:

From the earliest days of the Republic, certain parties have had a monopoly on power along with the collaboration of civil and military bureaucrats. In order to preserve that monopoly, the policy of those in power has been to refuse to recognize the existence of the Kurdish people and to ignore its most legitimate rights.

The dominant 'Turkish' philosophy has been maintained up to the present day, overriding the most natural rights and claims of the Kurdish people, by means of militaristic and chauvinistic propaganda and a policy of exile and destruction. State policy, based on a capitalist system designed to oppress minorities – particularly Kurdish minorities, but even Turkish ones – has been pursued in the name of modernization and westernization.

OZDEP proposes to create a system ruled by peace and fraternity in which our peoples will be entitled to self-determination.²²³

²²² Güney, Aylin, and Başkan, Filiz. Party Dissolutions and Democratic Consolidation Case: The Turkish Case, *South European Society & Politics* 13, no. 3 (2008): 273

²²³ ECHR Judgment, Case of Freedom and Democracy Party (OZDEP) v. Turkey, 4

According to the Chief Prosecutor claiming that there are Kurdish people and minorities in Turkey and mentioning the right to self-determination equals undermining the principle of indivisible integrity of the state as stated in the Preamble and Articles 2 and 3 of the Constitution and also in Article 81 (a) of the Law on Political Parties. Especially Article 81 (a) of the Law on Political Parties directly prohibits political parties to argue that there are minorities in Turkey, based on differences of national or religious culture, race, or language.

The Chief Prosecutor also tries to prove that there are no minorities in Turkey by giving legal and historical references. First of all, he states that:

The issue of minorities was regulated firstly by the Lausanne Treaty dated 24.7.1923 and only those who were not Muslim were included in the scope of minorities. And, the means to benefit from the civil and political rights provided for Muslims was given to those who were not Muslim, too, and such regulation was made to point out that everyone was equal before the laws without making any discrimination of religion. In the Turkish legal system, no minority is present other than those accepted by these two treaties.²²⁴

The Chief Prosecutor also gives reference to Article 66(1) of the Constitution which states that “[e]veryone bound to the Turkish state through the bond of citizenship is a Turk.” For him, Turkish nation is exclusively civic, based on the bond of citizenship only. He concludes that within such national unity, no minorities can be legally recognized based on the distinction of national or religious culture, sect or race or language.

The Chief Prosecutor also argues that there is no need to recognize Kurds as minorities by stressing the common history and religion of Kurds with the rest of the nation. According to him:

People having a common past, history, religion and value judgment, in other words, an identical common culture, formed the “Turkish nation” by the will of belonging to a single nation and founded the Republic of Turkey, no matter what their ethnic origin is. This unity of the nation is so powerful that Kurds took part

²²⁴The Turkish Constitutional Court’s ruling on OZDEP case on November 11, 1993; no. 1993/2: 31

in the War of Independence together with the other citizens. In this respect, the Turkish nation consists of a unique people, the Turkish people, and not of various peoples.²²⁵

The Chief Prosecutor also points to the party programme asking for right to education in mother tongue. For the Chief Prosecutor, it is in contradiction with article 42 of the Constitution prohibiting the teaching of languages other than Turkish as mother tongue in the educational institutions to Turkish citizens.

The sentence in the party programme stating that “A person’s mother tongue shall be given precedence in court proceedings.” is considered as legally problematic in the indictment. The Chief Prosecutor states that judiciary is one of the basic functions of the state. Therefore, there is no doubt at all that judicial processes are official processes. According to the provision of Article 3 of the Constitution, the language of the state is Turkish. The official processes including jurisdiction processes and activities must be made in Turkish. That is why the statement in the party programme contradicts Article 3 of the Constitution.

Lastly, the Chief Prosecutor cites another statement of the party programme programme requiring the right to free development of culture:

An order will be established permitting the Turkish and Kurdish peoples and the minorities to develop and enjoy their particular cultures freely. Each people will be entitled to education in its mother tongue, that being an essential prerequisite for the development of a people and a nation.

For him, this part of the programme not only contradicts Article 42 of the Constitution for the reasons stated above, but also Article 81(b) of the Law on Political Parties as it aims at minorities developing and enjoying their particular cultures freely.²²⁶ According to Article 81(b) “political parties cannot pursue the aim or engage in activities to harm national unity by way of creating minorities in the territory of the Republic of

²²⁵Ibid, 32

²²⁶Ibid, 39

Turkey through protecting, developing or spreading languages and cultures other than the Turkish language or culture.”²²⁷

4.2.2. The Defense of OZDEP

In its defense, OZDEP argues that it interprets the principle of indivisible integrity and secularism different from the political power’s understanding, and it develops its proposed solution based on its own definition and interpretation.²²⁸ It stresses that the political parties can be banned in Turkey simply because they do not interpret democracy as the constitutional authorities do.²²⁹

OZDEP indicates that the Law on Political Parties contradicts Articles 10, 11, 12, 13, 14, 66, 68, 69 of the Constitution. However, the provisional Article 15 of the Constitution makes cancellation of the Law on Political Parties impossible. OZDEP requests the Constitutional Court to apply the provisions of the Constitution and the international agreements signed by Turkey, instead of the provisions of the Law on Political Parties which contradicts the Constitution.²³⁰

4.2.3. The Decision of the Constitutional Court

In the different parts of its decision, the Constitutional Court discusses the request of OZDEP about not applying the provisions of Law on Political Parties. It states that to be able to ignore a law during decisions, either two laws have to contradict each other or a law has to contradict the Constitution. However the existence of the provisional Article 15 is not a contradiction when it is considered in the context of the Constitution as a whole, it is rather an exception. And the Court stresses that it is impossible to ignore the existence of

²²⁷Law on Political Parties, art.81

²²⁸The Turkish Constitutional Court’s ruling on OZDEP case on November 11, 1993; no. 1993/2: 45

²²⁹ Ibid, 46

²³⁰ Ibid, 43

this article and thus it is unauthorized review constitutionality of the Law on Political Parties because of the provisional Article 15.²³¹ It is important to mention that the provisional Article 15 was prohibiting the Constitutional Court to review laws passed during National Security Council rule (1980-1983) including Law on Political Parties until it is abolished after 2001 constitutional amendments.²³²

The Court agrees with the indictment's claim that the issue of minorities is regulated by the Lausanne Treaty and there are no minorities present, other than those accepted by the Lausanne Treaty.²³³ Thus, very reference to the existence of Kurdish nation and other minorities that are not accepted in the Lausanne Treaty undermines the principle of indivisible integrity of the state.²³⁴

We can infer that according to the Court claiming that there are minorities in Turkey automatically means that these minorities are separate from the Turkish national integrity. The following parts of the reasoning shed light on this issue:

The recognition of minority status based on differences of race and language is incompatible with the notion of territorial and national integrity. Just as citizens of other origins, the citizens of Kurdish origin are not prohibited from expressing their identity; it has been stipulated, however, that they are not a minority or a different nation, that they cannot be conceived outside the Turkish nation, and that they are placed in the integrity of the state. Citizens of Kurdish origin do not carry a characteristic conforming to the sociological and legal definitions of a minority; nor are there any legal rules that differentiate them from other citizens. Together with the other citizens, they are subject to uniform laws. No discrimination is being made between the Kurds and other citizens as they are benefiting from the same unlimited individual rights and freedoms as limitless. There is no right present withheld, privated, restricted... In the State of the Republic of Turkey, there is one state and one nation, not more than one nations. Even though there are individuals of different origins in the Turkish Nation, they are all placed in the unity of the Turkish Nation... The State is SINGLE; the territory is a WHOLE; the nation is ONE.²³⁵

²³¹ Ibid, 77

²³² Ozbudun, Ergun. *Democratization and the Politics of Constitution Making in Turkey*, (Budapest: CEU Press, 2009), 63

²³³ The Turkish Constitutional Court's ruling on OZDEP case on November 11, 1993; no. 1993/2: 75

²³⁴ Ibid, 76

²³⁵ Ibid, 72

It can be seen that for the Court being a minority means being outside the Turkish nation. In other words, in the Court's view, being part of the nation and being a minority are mutually exclusive concepts.²³⁶ According to the Court, being subject to the uniform laws and benefiting from unlimited individual rights and freedoms are the most important aspects of belonging to the Turkish nation. As a result, those who ask for differentiated treatment or who are already granted minority status are excluded from the Turkish nation.²³⁷ That is why OZDEP's asking for minority rights for Kurdish people in its programme violates the constitution.

According to Baskin Oran, because of its fear that the recognition of diverse identities will lead to the disintegration of the state, the Court considers minority rights not as universal human rights but as a subject of national legislation and within a limited understanding of the Lausanne Treaty.²³⁸ I agree with Bayir that this approach of the Constitutional Court about the minority concept cannot be simply explained by fear of disintegration²³⁹, rather it stems from the fact that the Court is a strong supporter of the ideology of Turkish nationalism.²⁴⁰

The Court also rules that demands of OZDEP about the use of mother tongue in education and judicial proceedings are unconstitutional. By this decision, the Court shows that it shares the mindset of the legislators of the Law on Political Parties and thinks that a minority is an "artificial formation" and something that might be formed by politics. As a result, the Court sees its aim as preventing these sorts of artificial formation endeavours.²⁴¹

²³⁶ Bayir, Derya. *Negating Diversity: Minorities and Nationalism in Turkish Law*, (PhD diss., Queen Mary University of London, 2010) : 229

²³⁷ Ibid, 233

²³⁸ Oran, Baskin. "Minority Concept And Rights In Turkey: The Lausanne Peace Treaty and Current Issues," in *Human Rights in Turkey*, ed. Zehra F. Kabasakal Arat (Pennsylvania, Pennsylvania Press:2007), 49

²³⁹ Bayir, Derya. *Negating Diversity: Minorities and Nationalism in Turkish Law*, (PhD diss., Queen Mary University of London, 2010) , 242

²⁴⁰ Ibid, 262

²⁴¹ Ibid, 249

Regarding the part in OZDEP's programme about the right to self-determination, the Court decides that it is against the principle of the indivisible integrity of the state. The Court equates the demands of self-determination with the demand of secession of the state without questioning the meaning of the right to self-determination.

Baskin Oran argues that as the Court cannot differentiate between internal and external self determination, it simply reads self- determination as demand for secession.²⁴² "Internal self-determination may take various forms such as autonomy within a state, federal arrangements or any other special constitutional arrangements for the people concerned." External self-determination is people's decision to establish an independent state, create a free association with an independent state or integrate with an existing independent state.²⁴³

The Court goes even further and states that:

Although OZDEP is frequently using in its program the words "brotherhood" and "unity", it can be understood that it is doing this to hide its real objective. The program of the defendant party is creating feelings of revenge, hostility and separation feelings among the citizens. The programme of the party aims to divide the Turkish nation's unity based on racism. It is obvious that such program provisions target breaking down the country and national integrity.²⁴⁴

If we consider that OZDEP was being judged because of its programme, we can argue that the Court has no evidence about the activities of the party by using which it can conclude about its objectives. Moreover, according to the Court, the objectives that are mentioned in the decision cannot be found in the party programme. That is why the Court finds the right to speculate about secret objectives of the party without giving any reference to programme. This part of the decision seems quite problematic if we consider that it is part of a legal document which is supposed to be based on legal regulations in the Constitution and laws and its violations by party programme rather than secret aims that are foreseen by the

²⁴²Oran, Baskin. Ulusal Egemenlik Kavraminin Donusumu, Azinliklar ve Turkiye, 26
http://www.anayasa.gov.tr/files/pdf/anayasa_yargisi/anyarg20/b_oran.pdf

²⁴³Vezbergaite,Ieva. Remedial Secession as an Exercise of Right to Self Determination of Peoples, (MA diss., Central European University, 2011), 14

²⁴⁴The Turkish Constitutional Court's ruling on OZDEP case on November 11, 1993; no. 1993/2: 80

Court. As a result, the Constitutional Court made an order dissolving OZDEP.²⁴⁵ After its closure, OZDEP applied to the ECHR alleging a violation of Articles 9, 10, 11 and 14 of the Convention and the ECHR gave its final decision on 8.12.1999.²⁴⁶

4.2.4. The Judgment of the ECHR

Before the ECHR, OZDEP argued that it had been clearly stated in its programme that it favored a democratic and peaceful solution to the Kurdish problem. There is nothing in the programme that can be interpreted as the party seeking the partition of Turkey. On the contrary, the need for the country to remain unified is stressed in the programme as it is stated that the party wished to work for the unity of the Turkish and Kurdish peoples, who together would form the country on the basis of equality and voluntary association. However, for the Constitutional Court the use of the words “Kurd”, “Kurdish people”, “minority” and “peoples” in the party’s programme was enough to justify the dissolution of party.²⁴⁷

The government defended itself arguing that OZDEP was using democratic freedoms in an attempt to divide Turkey. By referring to the right to self-determination, the government argued that OZDEP had openly supported the armed struggle in its programme. The government showed the sentences in the programme stating that “OZDEP supports the just and legitimate struggle of the peoples for independence and freedom. It stands by them in this struggle.” as the declaration of this support.

The ECHR stated that when it considers the above quoted sentence, it finds nothing in it that would incite people to use violence or break the rules of democracy.²⁴⁸ The ECHR ruled differently from the Turkish Constitutional Court about the intention of OZDEP while referring to the right to self-determination. According to the ECHR the intention of OZDEP is

²⁴⁵ EHCR Judgment, Case of Freedom and Democracy Party (OZDEP) v. Turkey, 6

²⁴⁶ Ibid, 11

²⁴⁷ Ibid, 15

²⁴⁸ Ibid, 18

not to encourage people to seek separation from Turkey, but instead to emphasize that the proposed political project must be underpinned by the freely given, democratically expressed, consent of the Kurds. More importantly, the ECHR stated that:

The fact that such a political project is considered incompatible with the current principles and structures of the Turkish State does not mean that it infringes democratic rules. It is of the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a state is currently organized, provided that they do not harm democracy itself.²⁴⁹

4.3. The Refah Party Case

In Turkey's legal history, the Turkish Constitutional Court closed four political parties for violating the principles of secularism.²⁵⁰ The Islamist Welfare Party (*Refah Partisi*, RP) was founded in 1983 as "political voice for religious voters" after the banning of the National Salvation Party, which, together with all other parties, had been dissolved in the aftermath of the 1980 coup.²⁵¹ In the 1995 national elections the RP had gained 22 per cent of the vote, which translated into 157 MPs or one third of the seats in Parliament.²⁵² In June 1996, it formed a coalition government with the centre-right True Path Party.²⁵³

The Chief Prosecutor applied to the Turkish Constitutional Court to have the party dissolved on the grounds that it has been the center of the activities contrary to the principle of secularism by referring to acts and remarks by certain leaders and members of the RP.²⁵⁴ On 16 January 1998 the Constitutional Court dissolved the party on the same grounds.²⁵⁵ The RP had been ruling for a year when it was dissolved. Therefore, the closure of the RP is important

²⁴⁹ Ibid, 19

²⁵⁰ Wing, Adrien Katherine, and Varol, Ozan. Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example Texas International Law Journal 42, no. 1, (2007):8

²⁵¹ Güney, Aylin, and Başkan, Filiz. Party Dissolutions and Democratic Consolidation Case: The Turkish Case, South European Society & Politics 13, no. 3 (2008): 267

²⁵² Boyle, Kevin, Human Rights, Religion and Democracy: The Refah Party Case, Essex Human Rights Review 1 no. 1 (2004): 4

²⁵³ Güney, Aylin, and Başkan, Filiz. Party Dissolutions and Democratic Consolidation Case: The Turkish Case, South European Society & Politics 13, no. 3 (2008): 267

²⁵⁴ ECHR Judgment, Case of Refah Partisi (The Welfare Party) and Others v. Turkey, 4

²⁵⁵ Ibid, 7

as it shows that the Court has not banned only small parties that have no chance to form a government, but also the ruling parliamentary parties.²⁵⁶ It is fair to argue that, by any standard, the dislodging of a government from office by the decision of the Court is a radical intervention in democratic political life.²⁵⁷

The RP case gains even more significance as the procedure of dissolving party started on 21 May 1997 after the representatives of Turkish military expressed their extreme uneasiness about the party's religiously oriented policies at the regular National Security Council meeting on 28 February 1997.²⁵⁸ Moreover, the Chief Prosecutor, Vural Savas, who initiated the case against the RP and prepared the indictment, is known for his views contrary to Islamist lines of politics. The shortness of the time he devoted to prepare the indictment together with his public speeches about the RP, became issues of public debate. He even wrote a book called "Militant Democracy" in which he expressed the necessity to defend the Turkish democracy through the adoption of harsh measures against Islamist revivalism and Kurdish nationalism.²⁵⁹

4.3.1. Claims of the Chief Prosecutor in the Indictment

Different from OZDEP case which was judged because of party programme, the Chief Prosecutor accused the RP for being center of activities contrary to the principle of secularism. The Chief Prosecutor and most of the time the Court do not specify the violated Articles for each case, rather they argue that each case violates the principle of secularism.

The principle of secularism is protected by the Preamble, Article 4, 14, 24(4) and 147 of the Constitution together with Article 68(4). The reflections of this principle can be found

²⁵⁶ Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2, (2002) :61

²⁵⁷ Boyle, Kevin, Human Rights, Religion and Democracy: The Refah Party Case, *Essex Human Rights Review* 1 no. 1 (2004): 2

²⁵⁸ Güney, Aylin, and Başkan, Filiz. Party Dissolutions and Democratic Consolidation Case: The Turkish Case, *South European Society & Politics* 13, no. 3 (2008): 267

²⁵⁹ Kocacioglu, Dicle. Progress Unity and Democracy, Progress, Unity, and Democracy: Dissolving Political Parties in Turkey , *Law & Society Review* 38, no. 3 (2004): 441

in Articles 84, 85, 86, 87, 88, and 89 of the Law on Political Parties. These provisions include the protection of Atatürk's principles and reforms (Art. 84), respect for Atatürk (Art. 85), protection of the principles of secularism and the prohibition of the advocacy of the return of khilafat (temporal and spiritual head of all Muslims held by the Ottoman sultans from 1517 to 1924 when it was abolished) (Art. 86), the prohibition of the exploitation of religion and things held sacred by religion (Art. 87), prohibition of religious demonstrations (Art. 88), and the preservation of the status of the Presidency of Religious Affairs (Art.89).²⁶⁰

Firstly, the Chief Prosecutor argued that the RP's support for female students and civil servants wearing the headscarf, contradicts the principle of secularism. To quote from the indictment:

Despite the decision of the Constitutional Court confirming that the students attending school with religious headscarf attire contradicts the principle of secularism, believing that it reaps votes, Chairman Necmettin Erbakan and other party members claimed persistently nearly in every speech that receiving education and working in government offices with a headscarf is a constitutional right, they organized opposition, incited the public, and in fact Chairman Erbakan has stated in an election speech that "when they form the government, the university chancellors are going to retreat before the headscarf."²⁶¹

Although in literature it is argued that in this part of the indictment, the Chief Prosecutor refers to Law on Higher Education²⁶², when we consider the primary source we can see that the prosecutor only refers to a particular decision of the Constitutional Court regarding this Law. There are no regulations in the Law on Higher Education that prohibit the female students attending school with religious headscarf. However, in 1980s the female students were not able to attend university with the headscarf because of Article 7 of the Student Discipline Code enacted by Council of Higher Education. In 1988, Parliament passed Law no. 3511 to add the Provisional Article 16 to the Law on Higher Education which states

²⁶⁰Ozbudun, Ergun. Party Prohibition Cases: Different Approaches by the Turkish Constitutional Court and European Court of Human Rights, *Democratization* 17, no.1 (2010): 131

²⁶¹The Turkish Constitutional Court's ruling on The Welfare Party case on January 16, 1997; no. 1998/1:6

²⁶²Güney, Aylin, and Başkan, Filiz. Party Dissolutions and Democratic Consolidation Case: The Turkish Case, *South European Society & Politics* 13, no. 3 (2008): 269

that “female students are allowed covering the neck and hair with a headscarf or *türban* for religious belief”.²⁶³ However, that article went before the Constitutional Court and the Court struck down the law as unconstitutional on 07.03.1989 ruling that it is contrary to the principle of secularism.²⁶⁴ And the Chief Prosecutor uses this decision of the Constitutional Court not only prove that wearing the headscarf is contrary to the principle of secularism but also the activities of the party infringes this principle.

The Chief Prosecutor also points to some speeches of the party leader and members. One of them is a speech made by party leader Necmettin Erbakan on 23 March 1993 in Parliament, which is supporting plurality of legal systems. To quote the speech:

... There must be several legal systems. The citizen must be able to choose for himself which legal system is most appropriate for him, within a framework of general principles. Moreover, that has always been the case throughout our history. In our history there have been various religious movements. Everyone lived according to the legal rules of his own organisation, and so everyone lived in peace. Why, then, should I be obliged to live according to another’s rules? ... The right to choose one’s own legal system is an integral part of the freedom of religion.²⁶⁵

In addition, the Chief Prosecutor points to various speeches of MPs, vice-chairman of the party and mayor of Kayseri. The mayor of Kayseri, Mr Şükrü Karatepe says on 10 November 1996: “This system must change. We have waited; we will wait a little longer. Let us see what the future has in store for us. And let Muslims keep alive the resentment, rancour and hatred they feel in their hearts.”²⁶⁶ The Chief Prosecutor argues that although these speeches were publicized, the fact that the RP did not start any process of disciplinary action against those who made these speeches is clear evidence that these speeches are embraced also by the party executives.²⁶⁷

²⁶³ The law passed in the Parliament on December 10, 1988; annex 16 added to the law no. 2547.

²⁶⁴ Kuru, Ahmet. *Reinterpretation of Secularism in Turkey: The Case of the Justice and Development Party,* in *The Emergence of a New Turkey: Democracy and the AK Parti* ed. M. Hakan Yavuz (Salt Lake City: University of Utah Press, 2006), 16

²⁶⁵ ECHR Judgment, *Case of Refah Partisi(The Welfare Party) and Others v. Turkey*, 9

²⁶⁶ ECHR Judgment, *Case of Refah Partisi(The Welfare Party) and Others v. Turkey*, 12

²⁶⁷ The Turkish Constitutional Court’s ruling on The Welfare Party case on January 16, 1997; no. 1998/1: 6

According to the Chief Prosecutor the policy of the RP to open more Faculties of Divinity than necessary, and more primary schools of divinity for clerical personnel (Imam Hatip Schools), and subjecting millions of students to religious education is openly contrary to the Constitution and the principle of secularism. The arguments of the prosecutor while reaching this conclusion is worth mentioning:

Even in most developed democratic countries the religious education is deemed an important impediment to the raising of secular and free thinking citizen, and each democratic state has kept “religious education” under control by provisions included sometimes in their constitutions and laws, and sometimes only by supreme court judgments. Because, beyond the schools necessary for meeting the need for “clerics”, any state which acquiesces to the changing and re-forming of the minds of millions of children through religious instruction cannot be qualified as a secular state.²⁶⁸

The Chief Prosecutor defines the limits of secular state himself in terms of religious education and he argues that the RP infringed the principle of secularism by referring to the general principle in the Constitution. It is fair to argue that the Chief Prosecutor has vast power of interpretation.

The Chief Prosecutor also claims that the policy of the RP is not in line with the advices of National Security Council. “Although National Security Council advised our government to close down the Imam-Hatip schools and henceforth not to open new ones, the RP’s claiming that it is necessary to open new such schools in public speeches is against the principle of secularism. ”

National Security Council is an advisory body consisting of high level military officers, the views of which should given priority by Council of Ministers.²⁶⁹ Even if we take into account that NSC legitimized the military's active involvement in politics as an actor of the political system and guardian of the regime²⁷⁰, it is not usual to see a reference to the statement of an advisory body in a legal document which consists the basis of the claim of the

²⁶⁸ Ibid, 10

²⁶⁹ Jenkins, Gareth, *International Affairs* 83,no. 2(2007) : 344

²⁷⁰Uzgel, İlhan. *Between Praetorianism and Democracy: The Role of the Military in Turkish Foreign Policy* The Turkish Yearbook of International Relations 34 (2003):181

Chief Prosecutor that actions of a political party infringe the principle of secularism. As a result, the Chief Prosecutor requested the Court to close the party.

4.3.2. The Defense of the Refah Party

In its defense, the RP states that it does not accept the understanding of the Chief Prosecutor about secularism because it is not in line with the spirit of the 1982 Constitution.²⁷¹ The RP stresses the justification of Article 2 of the Constitution given by constitution-makers stating that “secularism is not a strict principle and it does not mean atheism. It enables everybody to enjoy freedom of religion and freedom of worship”. Moreover the party points to the constitutionally guaranteed freedom of religion.²⁷²

The party offers its own definition of secularism: “Secularism is not enmity against religion. On the contrary it is a principle developed and implemented to protect freedom of religion and freedom of conscience from all sorts of violation.”²⁷³ Moreover, the party describes secularism as the capacity to adhere to any religion and practice it in ways that do not destroy the public order. In this way, it tries to convince the Court that its policies and the cited speeches that take part in the indictment is not contrary to the principle of secularism.²⁷⁴

Regarding the claims in the indictment on the issue of the headscarf, the RP argued that its opinions about the headscarf are not contrary to the principle of secularism and that criticizing the policies regarding the headscarf does not violate this principle.²⁷⁵ On the demand for the plurality of legal systems, the party argues that its MP Erbakan was referring to freedom to enter contracts in the private law.²⁷⁶ In relation to speeches made by other party members, the RP argued that these people and their speeches did not represent the Party and

²⁷¹The Turkish Constitutional Court’s ruling on The Welfare Party case on January 16, 1997; no. 1998/1: 73

²⁷² Ibid, 65

²⁷³ Ibid, 50

²⁷⁴Kocacioglu, Dicle. Progress Unity and Democracy, Progress, Unity, and Democracy: Dissolving Political Parties in Turkey, Law & Society Review 38, no. 3 (2004): 450

²⁷⁵ Ibid, 82

²⁷⁶ Ibid, 98

the people concerned were expelled from membership to avoid becoming a centre of illegal activities contrary to the principle of secularism.²⁷⁷

The RP stated that it does not accept the claims in the indictment related with religious education arguing that religious education is necessary to enjoy freedom of religion and conscious.²⁷⁸ About the part in the indictment connecting the party's not following advices of National Security Council and violation of the principle of secularism, the party rightly stated that National Security Council is not an organ superior to Parliament or the Government.²⁷⁹ It is an advisory organ that has no executive powers and its decisions do not carry the force of command. Hence, opposing of such decisions do not constitute a law infringement.²⁸⁰

4.3.3. The Decision of the Constitutional Court

Before passing to evaluate the claims stated in the indictment, the Court started with the passages about its understanding of secularism. According to the Court:

Secularism is a way of life that has destroyed the medieval scholastic dogmatism and has become the basis of the vision of democracy that develops with the enlightenment of science, nation, independence, national sovereignty, and the ideal of humanity... In the secular order, religion "is saved from politicization, saved from being a tool of administration and kept in its real respectable place which is the conscience of the people."²⁸¹

By locating the religion in the conscience of the people the Court shows that it embraces what Ahmet Kuru calls assertive secularism. According to Kuru, while passive secularism implies that the state stays neutral toward religions and allows their public visibility, assertive secularism means that the state favors a secular worldview in the public sphere and aims to confine religion to the private sphere.²⁸² By using this definition, the Court

²⁷⁷ EHCR Judgment, Case of Refah Partisi(The Welfare Party) and Others v. Turkey, 6

²⁷⁸ Ibid, 87

²⁷⁹ Ibid, 92

²⁸⁰ Ibid, 84

²⁸¹ Ibid, 196

²⁸² Kuru, Ahmet. Reinterpretation of Secularism in Turkey: The Case of the Justice and Development Party," in :The Emergence of a New Turkey: Democracy and the AK Parti ed. M. Hakan Yavuz (Salt Lake City: University of Utah Press, 2006), 2

promotes the notion that Islam can be separated out from other types of social activities, including politics, to create a neutral, non-religious public space and institutions.²⁸³ This definition gains importance in the closure decisions of Islamist political parties as there are no specific legal regulations defining the place of the religious symbols and rituals in the public sphere other than the general principle of secularism stated in the Constitution and Law on Political parties. As I will mention below, while giving its decisions, the Court stays loyal to its definition of secularism and jealously defends the public sphere from religious symbols and rituals.

In its decision, about the claims in the indictment regarding the speeches related with the headscarf, the Court states that :

Permitting covering the neck and hair by headscarves at public offices and universities creates pressure on the ones who do not follow this practice and even forces them to follow it. Forcing people to various attires and covering of heads can create conflicts even among people of the same religion. Headscarves and certain related forms of attire can be used not only a tool of privilege but also a tool of discrimination in public organizations and universities. Undoubtedly this situation is contrary to the principle of secularism.²⁸⁴

To base its decision, the Court refers to the principle of secularism that finds its reflection in the Preamble and Article 2 of the Constitution and stresses Article 42(3) of the Constitution which indicates that :

Training and education shall be conducted along the lines of the principles and reforms of Atatürk, on the basis of contemporary science and educational methods, under the supervision and control of the state. Institutions of training and education contravening these provisions shall not be established.²⁸⁵

Regarding the speech supporting plurality of legal systems, the Court ruled that it is not limited to enter contracts in the private law. To quote the decision of the Court:

²⁸³ Shively, Kim. Taming Islam: Studying Religion in Secular Turkey *Anthropological Quarterly* 81, no. 3, (2008): 685

²⁸⁴ The Turkish Constitutional Court's ruling on The Welfare Party case on January 16, 1997; no. 1998/1: 199

²⁸⁵ The 1982 Constitution, art. 42, sec. 2

The idea of plurality of legal systems stems from the Islamic idea of the Medina Act, also known as the Constitution of Medina. Some Islamist political thinkers inspired by this contract propose that religious communities should have the freedom to choose their own legal system through which public peace can be established...Plurality of legal systems according to beliefs will make it difficult to establish legal bonds among citizens and also damage the national integrity. Unity in the legal system is a precondition of national unity. It is evident that plurality of legal systems will shake the foundations of secular system based on intellect and contemporary science. Such a view cannot be protected by the Constitution and Human Rights Treaties reflecting the universal values. Hence, speech of the Party Chairman Necmettin Erbakan is contrary to the principle of secularism.²⁸⁶

The Court did not accept the defense of the RP about the speeches of several party members including MPs, vice-chairman of the party and mayor of Kayseri stating that they did not have the authority to represent the Party and the people concerned were expelled from membership to avoid becoming a centre of illegal activities contrary to the principle of secularism. The Court interpreted the RP's behavior to put these people in effective positions as a sign that the party also embraces their views. For the Court, these officials were expelled from the Party only to avoid the closure. In general, for the all speeches mentioned, the Court decided that they violate the principle of secularism. The Court did not rule about the claim that about the policy of the RP about Faculties of Divinity and Imam Hatip Schools, because of the lack of evidence.

It is important to stress that the Court refers to the concept of militant democracy before giving its decision to close the RP. To quote that part of the decision:

It has been understood that democratic rights and freedoms have been used as tools to eliminate democracy in favour of "sharia order" by the Refah Party Chairman, Deputies and Party parliamentary members' speeches and activities. These behaviors may not receive the protection of Article 68 of the Constitution, and Article 17 of the Convention.²⁸⁷

²⁸⁶The Turkish Constitutional Court's ruling on The Welfare Party case on January 16, 1997; no. 1998/1 : 202

²⁸⁷Ibid, 214

The Court defined democracy as antithesis of sharia order.²⁸⁸ Based on this definition, The Court concluded that leaders and members of the RP were using democratic rights and freedoms with a view to replace the democratic order with a system based on sharia. These actions of the party cannot receive the protection of the Constitution and supranational human rights protection rules.²⁸⁹

As a result, the Constitutional Court made an order dissolving the RP on the ground that it has been the center of the activities contrary to the principle of secularism.

4.3.4. The Judgment of the ECHR

The RP applied to the ECHR claiming that the decision of the Constitutional Court is violates Articles 9, 10, 11, 14, 17, 18 of the Convention²⁹⁰ and the ECHR gave its final decision on 13.02.2003.²⁹¹ The RP case is distinct in a sense that for the first time in its history approved the reasoning of Turkish Constitutional Court about a closure decision.²⁹² The ECHR agrees that the activities of the RP present a threat to democracy. In this part, I will focus on how the Courts' understanding of threat reconcile with each other.

The ECHR approved the judgment of Constitutional Court that expelling the officials was not a sufficient ground for the Party's defense and added that taking into account the significant positions of the accused members in the party, their acts and speeches are imputable to the whole party.²⁹³

Regarding the question whether it sought to introduce a regime based on sharia, the RP argued in the first place that there was no reference in its constitution or its programme to either sharia or Islam. Secondly, it claimed that an analysis of the speeches made by its

²⁸⁸ Ibid, 215

²⁸⁹ Ibid, 214

²⁹⁰ ECHR Judgment, Case of Refah Partisi (The Welfare Party) and Others v. Turkey, 44

²⁹¹ Ibid, 1

²⁹² Hakyemez, Sevki and Akgun, Birol. Limitations on the Freedom of Political Parties in Turkey and Jurisdiction of the European Court of Human Rights, *Mediterranean Politics* 7, no.2(2002): 74

²⁹³ Ibid, 36

members did not demonstrate that it was the party's policy to introduce sharia in Turkey.²⁹⁴ Turkish Government responded by stating that it was not the party's programme which caused a problem but the fact that certain aspects of the activities and speeches of certain members of the RP proved that the party aims to introduce sharia if it held power alone.²⁹⁵

The ECHR approved the defense of Turkish Government stating that programme of a political party cannot be taken into account as the sole criterion while determining its intentions. According to the ECHR "the political experience of contracting countries has shown that political parties with aims contrary to the principles of democracy have not revealed such aims in their programme until after taking power." That is why the content of the programme must be compared with the actions of the party's leaders and the positions.²⁹⁶ The ECHR evaluated the speeches made by certain members of the RP, and concluded that they both refer to religious and divine rules as the basis of the political regime which the speakers wish to bring.²⁹⁷

It is important to mention that before giving its decision, similar with Constitutional Court, the ECHR stated that sharia is incompatible with democracy. To quote the decision of the ECHR:

Like the Constitutional Court, the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole.²⁹⁸

Together with the intention of the party to introduce sharia order, the ECHR also discusses the appropriate time for dissolution when there is such a threat. The RP argued that

²⁹⁴ Ibid, 24

²⁹⁵ Ibid, 26

²⁹⁶ Ibid, 32

²⁹⁷ Ibid, 36

²⁹⁸ Ibid, 39

it had been in power for a year, during which time it could have tabled draft legislation to introduce a regime based on sharia but it had done nothing of this sort.²⁹⁹ Turkish Government stated that the party had governed the country as part of coalition. Therefore it never had an opportunity to put its plan of setting up a theocratic regime into practice.³⁰⁰

Interestingly, the ECHR referred to an opinion poll carried out in January 1997, which estimates that if a general election had been held at that time, the RP would have received 38% of the votes. According to the ECHR, this shows that the RP has a potential to seize power without being restricted by the compromises of a coalition. The ECHR stated that a State cannot be required to wait, before intervening, until a political party has come to power and begun to take concrete steps to implement a policy incompatible with the democracy, even though the danger of that policy for democracy is sufficiently established and imminent.³⁰¹ The ECHR concluded that it cannot criticize Turkish Constitutional Court for acting before the danger concerned had taken shape and become real.³⁰² As a result, the ECHR ruled that there were convincing and compelling reasons justifying dissolution of the RP³⁰³ and there has been no violation of Article 11 of the Convention.³⁰⁴

As it can be seen, there are two reasons that the ECHR approved the closure decision of Turkish Constitutional Court. Firstly, both Courts decided that the real intention of the RP is to establish sharia order. Secondly, they accepted that sharia order is incompatible with democracy. That is why, in the RP case, we can see that both Courts use arguments stemming from militant democracy concept and they argue that the RP was using democratic rights and freedoms to establish a system based on sharia and closure of this party is not violation of norms that protect the right to freedom of assembly and association.

²⁹⁹ Ibid, 24

³⁰⁰ Ibid, 25

³⁰¹ Ibid, 32

³⁰² Ibid, 34

³⁰³ Ibid, 42

³⁰⁴ Ibid, 43

4.4. The TBKP Case

The Turkish Constitutional Court closed communist/socialist parties and three of these parties applied to the ECHR alleging a violation of the Convention, namely: Labour Party (*Emek Partisi*), Socialist Party of Turkey (*Sosyalist Türkiye Partisi*) United Communist Party of Turkey (*Türkiye Birleşik Komünist Partisi*, TBKP). It is interesting to note that only the closure decision of the United Communist Party of Turkey is related with the communist ideology of the party. Other parties were closed based on their programmes that undermine the indivisible integrity of the state with its territory and nation as they had articles in their party programme related with granting rights to Kurdish minorities.

4.4.1. Claims of the Chief Prosecutor in the Indictment

The TBKP was formed as a political party on June 4, 1990. Just ten days later, when the TBKP was preparing to participate in general elections, the Chief Prosecutor applied to the Constitutional Court to dissolve the TBKP.³⁰⁵ He accused the party of having sought to establish the domination of one social class over the others, of having incorporated the word “communist” into its name, of having carried on activities likely to undermine the principle of the indivisible integrity of the state with its territory and nation and of having declared itself to be the successor to a previously dissolved political party, the Turkish Workers’ Party.³⁰⁶

The Chief Prosecutor based the claims in the indictment on the parts of the party programme as well as the name of the party. He used the following passages as evidence:

The name of the political party is the United Communist Party of Turkey.³⁰⁷

The United Communist Party of Turkey determines its policies based on the Marxist theory which it enriches with contemporary thoughts in Turkey together with the democratic humanitarian values...

The objective of the United Communist Party of Turkey is to end oppression and inequality and go beyond capitalism by strengthening democracy, to enable social

³⁰⁵ Akbulut, Olgun .Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties, *Fordham International Law Journal* 34, no.1(2010) :48

³⁰⁶ EHCR Judgment, *Case of United Communist Party and Others v. Turkey*, 4

³⁰⁷ The Turkish Constitutional Court’s ruling on United Communist Party of Turkey case on July 16, 1991; no. 1991/1: 61

peace and to establish socialism. The United Communist Party of Turkey proposes the transition to socialism in a peaceful manner by realizing rooted transformations based on mass majority via strengthening the peace and democracy. The success of socialism will depend on the strength of democracy...³⁰⁸

The Chief Prosecutor claimed that Marxist ideology of the TPKP aims at establishing the rule of the workers over others, final goal being the establishment of communism. In other words, for the Chief Prosecutor embracing Marxist theory automatically means that the party aims to establish domination of one social class over others.

He continued claiming that even though the party stated it would adopt a peaceful manner for reaching the socialist revolution, there is no doubt that they aim to abolish democracy that they deem it violates their own ideology, to establish the communist order.³⁰⁹ The Chief Prosecutor based his claims on the Articles 6(3), 14 and 68 of the Constitution. Articles 14 and 68 of the Constitution were changed in 2001 Amendments. Article 14 of the Constitution states “[n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of establishing rule of a person or a group or the domination of one social class over the others...”³¹⁰ Article 68 prohibits “Article 68(4) prohibits political parties “to protect or establish class or group dictatorship”.³¹¹ According to Article 6(3) the right to exercise sovereignty shall not be delegated to any individual, group or class.”³¹² Based on these regulations, the Chief Prosecutor accused the TBKP of having sought to establish the domination of one social class over the others.³¹³

The Chief Prosecutor claimed that the party’s having incorporated the word “communist” into its name contradicts Article 93(3) of the Law on Political Parties³¹⁴ which

³⁰⁸ Ibid, 5

³⁰⁹ Ibid, 8

³¹⁰ The 1982 Constitution, art. 14, sec. 1

³¹¹ Ibid, art. 68, sec. 4

³¹² Ibid, art. 6, sec. 1

³¹³ The Turkish Constitutional Court’s ruling on United Communist Party of Turkey case on July 16, 1991; no. 1991/1: 13

³¹⁴ Ibid, 11

states that: “political parties shall not be formed with the name ‘communist’, ‘anarchist’, ‘fascist’, ‘theocratic’ or ‘national socialist’, the name of a religion, language, race, sect or region, or a name including any of the above words or similar ones.”³¹⁵

4.4.2. The Defense of the TBKP

In its defense, by referring to the Article 14 of the Constitution, the TBKP argues that although this article bans the rule of a person or a group, it does not ban the class rule. It means that it is free to establish a political party with a class name and based on a class. Since the political parties represent the interests of the some or various parts of the society, the existence of different classes cannot be ignored.³¹⁶ The Constitution only forbids establishing the domination of one social class over others.³¹⁷ Moreover the TBKP tries to refute the claim that the party aims to abolish democracy for reaching to socialist revolution, by referring to the articles in its programme that stresses its attaching importance to democracy.³¹⁸

The TBKP rightly argues that there is not provision in the Constitution banning a political party having incorporated the word “communist” into its name. The ban stemming from Article 96(3) of the Law on Political Parties does not comply with the Turkish Constitution and European Convention. The TBKP stresses that it is obvious that the ECHR will decide in favor of the TBKP if it applies to the Court by alleging the violation of the Convention. Pointing to the unconstitutional provisions of the Law on Political Parties the TBKP demands from the Court to cancel provisional Article 15 as it is not in line with the fundamental values of the Constitution.³¹⁹ TBKP further claims that the Court has the

³¹⁵ Law on Political Parties, art. 93

³¹⁶ The Turkish Constitutional Court’s ruling on United Communist Party of Turkey case on July 16, 1991; no. 1991/1: 13

³¹⁷ Ibid, 16

³¹⁸ Ibid, 21

³¹⁹ Ibid, 41

authority to cancel the law because provisional articles are for transition to a new order and after the achievement of the transitions they lose their legal validity.³²⁰

4.4.3. The Decision of the Constitutional Court

At the beginning of its decision the Court discusses the validity of the provisional articles. To quote from the decision :

Validity of temporary provisions is not assessed according to periods of their applicability but rather on the basis of temporary legal relationships between them and the institutions which they regulate, and the content of relevant basic premises and meanings which they attach. Temporary articles establish connections between different legal regulations and ensure preservation of the rights. Also in this respect, it is natural that certain variations may exist between the basic provisions and the provisional articles. The judicial value carried by the provisional articles are not different from that of other provisions. In fact, if it is considered that they bring distinct provisions, they have application priority.

Similar to its stance in the OZDEP decision, the Constitutional Court argues that it is not authorized to review the Law on Political Parties. It stresses that it cannot ignore any regulation which is clearly regulated by the Constitution even if justified judicial reasons may exist.³²¹

The Court firstly rejects the claim in the indictment that the party sought to establish the domination of one social class over others.³²² In this revolutionary decision, the Constitutional Court differentiates between ‘class sovereignty’ and ‘class government’ and rules that only the former was considered as unconstitutional since it amounts to class dictatorship, excluding a change of government through free and competitive elections.³²³ The Court ruled that the fact that the political party included in its name a word prohibited by

³²⁰Ibid, 45

³²¹Ibid, 46

³²²Ibid, 60

³²³Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel(Ashgate:2009), 298

Article 96(3) of Law on Political Parties, sufficed to close the party.³²⁴ To quote that part of the decision:

Since the defendant Party has the word ‘Communist’ in its name, its contradiction with Article 96(3) of the Law on Political Parties is clearly evident. The Law on Political Parties has regulated the use of name “communist” independently from the subject of establishing the domination of one social class over the others or aiming establishment of any type dictatorship...³²⁵

As a result, the Court made an order to dissolve the party as its name having incorporated the word “communist” into its name violates Article 96(3) of Law on Political Parties.

The reasoning of the Court in this case is considered in literature as relatively liberal.³²⁶ Still, the Court decides to dissolve the Party on the purely formal ground that the TBKP had included the word ‘communist’ in its name, contrary to the Law on Political Parties.³²⁷ If we consider that when this decision was being made, the Law on Political Parties is under protection of Provisional Article 15³²⁸, the Court cannot be criticized for not cancelling Article 96(3) of the same law. Moreover, if we take a look at the narrative of Article 96(3), we can see that it strictly prohibits parties from having the word “communist” in their name. So, it is fair to argue that while deciding based on this article, the Court has no chance to adopt a liberal approach. This might be the reason that the Court embraced two different approaches to two claims in the indictment. However, regarding the claim that the TBKP having sought to establish the domination of one social class over the others, the Court had an option to define “domination of the class” and decide whether the party has such an

³²⁴EHCR Judgment, Case of United Communist Party and Others v. Turkey, 6

³²⁵The Turkish Constitutional Court’s ruling on United Communist Party of Turkey case on July 16, 1991; no. 1991/1: 62

³²⁶Hakyemez, Yusuf Sevki. Containing the Political Space, Party Closures and the Constitutional Court in Turkey, *Insight Turkey* 10, no.2(2008): 141

³²⁷Oder, Bertil Emrah. Turkey in The Militant Democracy Principle in Modern Democracies, ed. Markus Thiel (Ashgate:2009),298

³²⁸ Ibid, 300

aim taking into account the programme of the party as a whole. As we will see, this contradiction will provide the basis of the judgment of the ECHR.

4.4.4. The Judgment of the ECHR

The TBKP applied to the ECHR on 7 January 1992 claiming that the Constitutional Court had infringed (a) Articles 6 § 2, 9, 10 and 11 of the Convention and the Court gave its final decision on 30.01.1998.³²⁹ Before the Court, it argued that the reasons given by the Constitutional Court for dissolving it were ill-founded. For the TBKP, there is a contradiction in penalizing a political party for calling itself “communist” when, on the one hand, the Constitutional Court had itself accepted that the TBKP was not seeking the domination of one social class over the others and that its constitution and programme were in accordance with democratic principles.³³⁰

The Turkish Government defended itself stating that the constitution and programme of the TBKP were clearly incompatible with Turkey’s fundamental constitutional principles. According to the Turkish Government by choosing to call itself “communist”, the TBKP referred to a subversive doctrine and a totalitarian political goal that undermined Turkey’s political and territorial unity and jeopardized the fundamental principles of its public law. “Communism” invariably aimed to establish a political order that cannot be accepted not only by Turkey but also the other member States of the Council of Europe.³³¹

In its judgment, the ECHR stated that in principle, a political party’s choice of name cannot justify its dissolution, in the absence of other relevant and sufficient circumstances. Moreover, it stressed that it attaches much weight to the Constitutional Court’s finding that the TBKP was not seeking, in spite of its name, to establish the domination of one social class

³²⁹ ECHR Judgment, Case of United Communist Party and Others v. Turkey, 10

³³⁰ Ibid, 21

³³¹ Ibid, 12

over the others, and that, on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics. Actually, the ECHR implied that the Constitutional Court itself nullified the possibility of the other relevant and sufficient circumstances that may justify its dissolution. As a result, the ECHR ruled that in the absence of any concrete evidence which shows that in choosing to call itself “communist”, the TBKP had opted for a policy that represented a real threat to Turkish society or the Turkish State, dissolution³³² is a drastic measure and ruled that this measure infringed Article 11 of the Convention.³³³

4.5. Conclusion

The analysis of the Court decisions reveals that in its reasoning the Court is constructing definitions parallel with the state ideology to be able to connect the accused programme or activities of the party with the regulations stated in the Constitution and the Law on Political Parties. In OZDEP case, the Court uses the definition of “nation”, “Turkish nation”, “citizenship”, and “minority” by giving references to selective ‘historical and political realities’ stemming from the official state ideology.³³⁴ By this way, the Court simply ignores the existence of the Kurdish minorities and accuses OZDEP for creating the minorities that does not exist. It is fair to argue that this decision shows that the Court shares the mindset of the legislators of the Law on Political Parties and thinks that “minority” is an artificial formation which may be formed by politics and defines itself as the defender of “national unity”.³³⁵

In Refah Party (RP) case, if we consider that regulations in the Law on Political Parties and the Constitution related with principle of secularism is very general, the Court’s

³³² Ibid, 24

³³³ Ibid, 26

³³⁴ Bayir, Derya. *Negating Diversity: Minorities and Nationalism in Turkish Law*, (PhD diss., Queen Mary University, 2010): 235

³³⁵ Ibid, 249

definition of secularism gains importance. Parallel with the Kemalist ideology the Court embraces the assertive version of secularism which defends the public sphere from religious symbols and rituals. The Court rules that wearing headscarf is contrary to the principle of secularism although there were no articles in the legal documents prohibiting female students wear the headscarf. This case also shows that the Court uses its vast powers of interpretation to defend the secular character of the state ideology. Both the RP and OZDEP case reveals that by using these definitions drawn from the official state ideology, the Court reproduces this ideology by its closure decisions.³³⁶

In TBKP case, the Court uses definitions of “class sovereignty” and “class government” to reject the claim in the indictment that the party sought to establish the domination of one social class over the others. This approach of the Court interpreted as a liberal attitude toward the expansion of the freedom of political parties.³³⁷. However the Court decided to dissolve the Party on the ground that it had included the word ‘communist’ in its name, contrary to Article 96(3) of the Law on Political Parties. As I have mentioned above, due to the fact that Article 96(3) strictly prohibits parties from having the word “communist” in their name, the Court does not have any option other than simply apply the law to this case. The intention of the Court to use definitions for a more liberal attitude towards TBKP can be explained by the fact that since the end of the Cold War and the collapse of communist regimes, socialist and communist parties are not perceived as a threat to the established order. As we can observe from the approach of the Court to the RP and OZDEP, political Islam and Kurdish nationalism have perceived as the most important threats for the state ideology.³³⁸

³³⁶ Ibid, 235

³³⁷ Hakyemez, Yusuf Sevki. Containing the Political Space, Party Closures and the Constitutional Court in Turkey, *Insight Turkey* 10, no.2(2008): 141

³³⁸ Güney, Aylin, and Başkan, Filiz. Party Dissolutions and Democratic Consolidation Case: The Turkish Case, *South European Society & Politics* 13, no. 3 (2008): 264

CHAPTER 5: CONCLUSION

The subject of this study was the concept and practice of militant democracy in Turkey. In particular, my goal was to find out the role of the Constitutional Court's interpretation in the practice of militant democracy in Turkey and especially in frequent closure of the political parties. My starting point was the fact that the Constitutional Court banned much higher number of political parties than other European countries that institutionalized militant democracy. Moreover, the criticism of the scholars about Constitutional Court stating that it is using its power of interpretation by prioritizing the state ideology as compared to freedom of assembly and association motivated me for further research. I argue that the roots of this militant attitude lie the early Republican period under Mustafa Kemal Atatürk, which witnessed a heavy social and political restructuring based on secularism and Turkish nationalism. It is since 1923 that modern Turkey based on the Kemalist ideology sees Islamism and Kurdish nationalism as the major threats to its existence.

I also argue that after the introduction of political pluralism the concept of militant democracy is developed by state elites consisting of military officers, judges, high-level bureaucrats to guard Kemalist legacy from Kurdish nationalism and Islamic revivalism represented by political parties.³³⁹ Applying Hirschl's hegemonic preservation thesis to this structure shows that the establishment of the Constitutional Court is the part of the strategy of state elites to strengthen and defend their own interpretation of the basic democratic values and their own interests against the threat of non-state political elites. This explanation locates my research question in a historical context and provides the reason why the Constitutional Court is more likely to protect the state ideology.

³³⁹Shambayati, Hootan. The Turkish Constitutional Court and the Justice and Development Party, *Middle Eastern Studies* 48, no.1 (2012):109
Bali, Asli. The Perils of Judicial Independence: Constitutional Transition and the Turkish Example, *Virginia Journal of International Law* 52, no.2 (2012):244

I found militant democracy institutionalized in the 1961 and 1982 constitutions, starting from the protection of the democratic regime from its internal opponents by means of restricting civil and political freedoms. Although both the 1961 and the 1982 Constitutions embraced the concept of militant democracy, it is much broader and institutionally developed in the latter. If we consider the regulations related with party closures it can be said that militant democracy largely focuses on protecting two basic constitutional principles: the principle of indivisible integrity of the state and the principle of secularism. In addition, and this is the third major ground of its application, militant democracy defends the constitutional order against the class-based rule.

I tried to provide detailed account of long list of prohibitions about political parties provided by the 1961 and 1982 Constitutions. Some of these provisions are very detailed, providing no room for interpretation. For instance, Article 96(3) of Law on Political Parties which prohibits political parties to be formed with the name ‘communist’ in their name, leaves the Court with no other option than directly implement this law. Some other prohibitions are shaped in general terms. For instance, Article 68(4) of the Constitution lists “the independence of the state” and “sovereignty of the nation” and “secularism” as the foundational values of the Turkish democracy, leaving it for Constitutional Court to define their meaning through interpretation.

By analyzing the Court decisions I show that the Court uses its vast power of interpretation to construct definitions parallel with the state ideology. For example, in OZDEP case the Court’s definition of ethnic minority is based on a unique interpretative strategy that combines reading the Constitution with references to history, enabling the Court to refuse the legal recognition of the Kurdish minority. This is a clear sign that the Court protects state ideology by using its reasoning.

One of the most important finding of the analysis of the closure of Refah Party (RP) concerns the relationship between different agents of state elites. I have indicated that the procedure of the closure of the RP started just three months after the National Security Council expressed its worries about the Islamist policies of the RP. I have also stressed that in the indictment of the Chief Prosecutor Vural Savas refers to the advisory decisions of the National Security Council (NSC) to prove that the activities of the party infringe the principle of secularism. It is not usual to see a reference to the advices of NSC in the indictment which is supposed to be based on legal regulations. This can be seen as evidence that state elites collaborate with each other when there is a serious threat to Kemalist ideology.

Regarding the claim in the indictment regarding wearing headscarf in public sphere, I have shown that the Court, by ruling that wearing headscarf is contrary to the principle of secularism, embraced the assertive version of secularism which defends the public sphere from religious symbols and rituals. However it is striking that the Court does not differentiate between the actions contrary to the principle of secularism and the freedom of parties to defend these actions. In other words, the Court finds it sufficient to decide that the RP violated the principle of secularism because it defended views contrary to the Court's own definition of secularism. I have concluded that both the RP and OZDEP cases reveal that by using these definitions drawn from the official state ideology, the Court reproduces this ideology by its closure decisions.

In TBKP case, I have shown that the Court embraced a liberal approach while defining the "class sovereignty" and "class government" and rejected the claim in the indictment that the party sought to establish the domination of one social class over the others. I have interpreted this behavior of the Court as it does not perceive socialist parties as a threat to the established order considering the fact that these parties have become marginalized since the end of the Cold War. By taking into account all three decisions of the Court I have

concluded that political Islam and Kurdish nationalism have perceived as the most important threats for the state ideology and the Court used its power of interpretation to protect it.

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